No. 14-1507

Title:	Steve Michael Beylund, Petitioner v. Grant Levi, Director, North Dakota Department of Transportation
Docketed:	June 23, 2015
Lower Ct:	Supreme Court of North Dakota
Case Nos.:	(20140133)
Decision Date:	February 12, 2015
Rehearing Denied:	March 24, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Jun 22 2015	Petition for a writ of certiorari filed. (Response due July 23, 2015)
Jul 15 2015	Waiver of right of respondent Grant Levi, Director, North Dakota Department of Transportation to respond filed.
Jul 29 2015	DISTRIBUTED for Conference of September 28, 2015.
Aug 26 2015	Response Requested. (Due September 25, 2015)
Sep 24 2015	Brief of respondent Grant Levi, Director, North Dakota Department of Transportation in opposition filed.
Nov 17 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 11 2015	Petition GRANTED The petitions for writs of certiorari in No. 14-1468 and No. 14-1470 are granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jan 26 2016	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including February 4, 2016. VIDED
Jan 26 2016	The time to file respondents' briefs on the merits is extended to and including March 15, 2016. VIDED
Feb 4 2016	Brief of petitioner Steve Michael Beylund filed.
Feb 4 2016	Motion to dispense with printing the joint appendix filed by petitioner Danny Birchfield. VIDED.
Feb 8 2016	Motion for leave to file amicus brief filed by Indiana Tech Law School Amicus Project in support of neither party. VIDED.
Feb 9 2016	Brief amicus curiae of DUI Defense Lawyers Association filed. VIDED.
Feb 11 2016	Brief amici curiae of Downsize DC Foundation, et al. filed. VIDED.
Feb 11 2016	Brief amicus curiae of American Civil Liberties Union filed. VIDED.
Feb 11 2016	Brief amici curiae of The National College for DUI Defense, and The National Association of Criminal Defense Lawyers filed. VIDED.
Feb 29 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. VIDED
Feb 29 2016	Motion for leave to file amicus brief filed by Indiana Tech Law School Amicus Project in

	support of neither party GRANTED. VIDED
Mar 4 2016	SET FOR ARGUMENT ON Wednesday, April 20, 2016. VIDED
Mar 14 2016	Record requested from the Supreme Court of North Dakota.
Mar 15 2016	DISTRIBUTED.
Mar 15 2016	Brief of respondent Grant Levi, Director, North Dakota Department of Transportation filed. (Distributed)
Mar 16 2016	Brief amicus curiae of The California District Attorneys Association filed. VIDED. (Distributed)
Mar 18 2016	Record received from U.S.D.C. District of Bowman County. (1-Box)
Mar 22 2016	Brief amicus curiae of United States filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of New Jersey and Seventeen States filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of The Council of State Governments, et al. filed. VIDED. (Distributed)
Mar 22 2016	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 22 2016	Brief amicus curiae of Mothers Against Drunk Driving filed. VIDED. (Distributed)
Mar 22 2016	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Mar 22 2016	Brief amici curiae of The National District Attorneys Association, et al. filed. VIDED. (Distributed)
Apr 4 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for enlargement of time for oral argument, and for divided argument GRANTED. and the time is divided as follows: 35 minutes for petitioners, 15 minutes for respondent North Dakota, 10 minutes for respondent Minnesota, and 10 minutes for the Solicitor General. VIDED
Apr 13 2016	Reply of petitioner Steve Michael Beylund filed. (Distributed)
Apr 20 2016	Argued. For petitioners: Charles A. Rothfeld, Washington, D. C. For respondents in Nos. 14-1468 & 14-1507: Thomas R. McCarthy, Arlington, Va. For respondent in 14-1470: Kathryn Keena, Assistant Dakota County Attorney, Hastings, Minn. For United States as amicus curiae in support of respondents: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. VIDED.
Jun 23 2016	Judgment in No. 14-1468 REVERSED and case REMANDED. Judgment in No. 14-1470 AFFIRMED. Judgment in No. 14-1507 VACATED AND REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Kagan, JJ., joined. Sotomayor, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined. Thomas, J., filed an opinion concurring in the judgment in part and dissenting in part.
Jul 25 2016	JUDGMENT ISSUED
Jul 25 2016	MANDATE ISSUED

14-1507

Supreme Court, U.S.
FILED
JUN 22 2015
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. Here, petitioner submitted to a test after being informed that refusal is a criminal offense; North Dakota subsequently suspended his drivers' license when the test returned positive. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steve Michael Beylund respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Dakota in this case.

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (App., *infra*, 1a-22a) is reported at 859 N.W.2d 403. The decision of the North Dakota district court (*id.* at 23a-37a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on February 12, 2015. App., *infra*, 22a. That court denied petitioner's motion for rehearing on March 24, 2015. *Id.* at 44a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

North Dakota law, N.D. Code § 39-08-01(1), provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> * * *
>
> e. That individual refuses to submit to any of the following:
>
> (1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or
>
> (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or
>
> (3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

> 2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

STATEMENT

This case is one of several presenting a question of exceptional importance: whether a State may criminalize a motorist's refusal to consent to chemical tests of his or her blood, breath, or urine. While this case involves the suspension of a driver's license—rather than the imposition of a criminal sanction—the reasoning of the court below turned substantially on its holding in a companion criminal case, which is currently before the Court in *Birchfield* v. *North Dakota*, No. 14-1468. For the reasons explained in *Birchfield*, as well as in *Bernard* v. *Minnesota*, No. 14-1470, the Court should grant the petitions in those cases; it should hold this petition pending disposition of those matters.

1. North Dakota, like twelve other States, has criminalized the refusal of a motorist who has been arrested for driving under the influence to submit to a warrantless chemical test designed to detect the presence of alcohol in the driver's blood. See N.D. Code § 39-08-01(1). A first refusal to consent to a chemical test qualifies as a misdemeanor, while subsequent offenses may qualify as a felony. *Ibid.*

2. Here, an officer stopped petitioner on suspicion of driving while intoxicated. App., *infra*, 2a-3a. Petitioner contends that the chemical test, adminis-

tered pursuant to North Dakota's test-refusal statute, was compelled in violation of his constitutional rights. *Id.* at 7a. As a result of a chemical test indicating that he was intoxicated, the North Dakota Department of Transportation suspended petitioner's automobile license for a period of two years. *Id.* at 40a-42a.

3. Petitioner appealed his license suspension to a North Dakota district court, which affirmed the suspension. App., *infra*, 23a-39a. Notwithstanding the "reading of the Implied Consent/Refusal law itself," the court concluded that "[a]ssessing the totality of the circumstances," it was "not persuaded that [petitioner] was coerced into consenting to the chemical test of his breath and blood." *Id.* at 36a.

4. The North Dakota Supreme Court affirmed. App., *infra*, 1a-22a. Resting substantially on its recent decision in *Birchfield*, the court reasoned that petitioner "voluntarily consented to the blood test." App., *infra*, 8a. The court noted that, under the "doctrine of unconstitutional conditions," "the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable." *Id.* at 12a. Having held in *Birchfield* that searches conducted pursuant to the implied consent law are not in fact unreasonable—and thus not in violation of the Fourth Amendment—the court concluded that petitioner "has not pointed out any statute under North Dakota's implied consent laws that requires him to submit to a blood test contrary to the Fourth Amendment." *Id.* at 16a. Because there was no "unreasonable search without a warrant or an exception to the warrant requirement," petitioner's unconstitutional conditions argument failed. *Ibid.*

The state court subsequently denied petitioner's request for rehearing. App., *infra*, 44a.

REASONS FOR HOLDING THE PETITION

The lower court's analysis turned, expressly, on its earlier decision in *State* v. *Birchfield*, 858 N.W.2d 302 (N.D. 2015), cert. pending *Birchfield* v. *North Dakota*, No. 14-1468. Although the penalty imposed below was civil in nature, the court's conclusion rested on its holding in *Birchfield* that compelling submission to a test by threatening criminal penalties for refusal is constitutional. The Court, accordingly, should hold this petition pending its resolution of *Birchfield*, and then it should dispose of it in accord with the result of that proceeding.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Birchfield* v. *North Dakota*, No. 14-1468.

Respectfully submitted.

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JUNE 2015

[1] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2015 ND 18

Steve Michael Beylund, Petitioner and Appellant

v.

Grant Levi, Director of the Department of Transportation Respondent and Appellee

No. 20140133

Appeal from the District Court of Bowman County, Southwest Judicial District, the Honorable William A. Herauf, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

Thomas F. Murtha IV, P.O. Box 1111, Dickinson, ND 58602-1111, for petitioner and appellant.

Douglas B. Anderson, Office of Attorney General, 500 N. 9th St., Bismarck, ND 58501-4509, for respondent and appellee.

Beylund v. Levi
No. 20140133

McEvers, Justice.

[¶1] Steve Michael Beylund appeals from a district court judgment affirming a Department of Transportation decision suspending his driving privileges for two years. We affirm concluding Beylund voluntarily consented to the chemical blood test administered by the police officer, and the criminal refusal statute does not violate Beylund's right under the Fourth Amendment or N.D. Const. art. I, § 8, nor does it violate the Fourth Amendment under the doctrine of unconstitutional conditions. We decline to address Beylund's argument regarding the legality of the stop because the issue was not sufficiently articulated in Beylund's specifications of error.

I

[¶2] On August 10, 2013, a Bowman police officer was dispatched to a call of an unwanted person. The police officer observed a vehicle that matched the given description of the unwanted person's vehicle, although the police officer testified that he "didn't think anything of that at the time." The police officer observed the vehicle nearly hit a stop sign while making a right hand turn into a driveway. The vehicle then stopped, partially in the roadway. The police officer testified he pulled up and stopped behind the vehicle, without activating his patrol car's emergency lights, and approached the vehicle "to make sure everything was fine with the individual or what was going on."

[¶3] According to the police officer's testimony, when he approached the vehicle, he noticed an empty wine

glass in the center console and an odor of alcohol emanating from the vehicle. The police officer returned to his patrol car to activate its amber warning lights. The police officer requested Beylund exit the vehicle, but he refused, until the police officer opened the door and commanded him to exit. Beylund struggled with his balance and was generally uncooperative. Beylund refused all field sobriety tests, claiming he had a "bad leg." Beylund agreed to take an onsite screening test, but failed to provide an adequate breath sample. The police officer then arrested Beylund and transported him to the hospital. At the hospital, the police officer read the implied consent advisory to Beylund, and Beylund agreed to take a chemical blood test. A blood sample was collected and submitted to the state laboratory. The test results showed an alcohol concentration of 0.250 g/100ml.

[¶4] In September 2013, a hearing was held before a Department of Transportation hearing officer. At the conclusion of the hearing, the hearing officer found the police officer had reasonable grounds to believe Beylund had been driving a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. § 39-08-01. Accordingly, the hearing officer suspended Beylund's driving privileges for two years.

[¶5] Beylund petitioned for reconsideration of the hearing officer's decision. Beylund argued the blood test was an unconstitutional warrantless search, without a valid exception to the warrant requirement, and North Dakota's implied consent law violates the unconstitutional conditions doctrine. The hearing officer granted Beylund's petition for reconsideration, but denied relief.

[¶6] Beylund filed a notice of appeal and specifications of error with the clerk of district court, appealing the hearing officer's suspension of his driving privileges. Beylund's specifications of error raised the same issues as his petition for reconsideration. However, in Beylund's appellant's brief to the district court, he also asserted the stop of his vehicle was illegal. The district court affirmed the hearing officer's decision. Beylund now appeals to this Court.

II

[¶7] "This Court reviews the Department's decision to suspend a person's driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32." *McCoy v. N.D. Dep't of Transp.*, 2014 ND 119, ¶ 6, 848 N.W.2d 659 (citing *Painte v. Dir., Dep't of Transp.*, 2013 ND 95, ¶ 6, 832 N.W.2d 319). "We review the agency's decision on appeal from the district court. However, the district court's analysis is entitled to respect if it is sound." *Herrman v. N.D. Dep't of Transp.*, 2014 ND 129, ¶ 6, 847 N.W.2d 768 (citation omitted) (quotation marks omitted). An agency's decision is accorded great deference, when reviewed on appeal. *McCoy*, at ¶ 6. Under N.D.C.C. § 28-32-46, we must affirm an administrative agency's decision unless one of the following conditions applies:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

[¶8] "We do not make independent findings of fact or substitute our judgment for that of the agency." *Fossum v. N.D. Dep't of Transp.*, 2014 ND 47, ¶ 9, 843 N.W.2d 282. Rather, we solely determine "whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." *Yellowbird v. N.D. Dep't of Transp.*, 2013 ND 131, ¶ 8, 833 N.W.2d 536. Once the facts are established, their significance presents a question of law, which we review de novo, *Bell v. N.D. Dep't of Transp.*, 2012 ND 102, ¶ 20, 816 N.W.2d 786. The "standard of review for a claimed violation of a constitutional right is de novo." *Martin v. N.D. Dep't of Transp.*, 2009 ND 181, ¶ 5, 773 N.W.2d 190.

III

[¶9] Beylund argues his stop was illegal because law enforcement did not have a reasonable articulable suspicion and the community caretaker function does not apply. The Department argues Beylund waived

his argument regarding the legality of the stop, by not including it in his specifications of error to the district court and, therefore, this Court should decline to consider this argument on appeal.

[¶10] Under N.D.C.C. § 28-32-42(4), a party appealing from the Department's decision to suspend driving privileges must file a notice of appeal and specifications of error. *Midthun v. N.D. Workforce Safety Ins.*, 2009 ND 22, ¶ 7, 761 N.W.2d 572; *Daniels v. Ziegler*, 2013 ND 157, ¶ 7, 835 N.W.2d 852. The specifications of error must be reasonably specific, "detailing which matters are at issue, so as to alert the agency, other parties, and the court of the particular errors claimed." *Midthun*, 2009 ND 22, ¶ 7, 761 N.W.2d 572 (citing *Vetter v. N.D. Workers Comp. Bureau*, 554 N.W.2d 451, 454 (N.D. 1996)). "Boilerplate specifications of error which are general enough to apply to any administrative agency appeal are not tolerated by this Court, and are ripe for dismissal." *Midthun*, at ¶ 7 (citing *Dettler v. Sprynczynatyk*, 2004 ND 54, ¶ 15, 676 N.W.2d 799). This Court will not consider issues that are not enumerated in the specifications of error. *Id.*

[¶11] Here, Beylund did not include the legality of his stop argument in the specifications of error to the district court. Rather, he merely asserted he "reserves the right to make additional specifications of error pending receipt of the transcript of the administrative hearing." Beylund's broad attempt to reserve the right to make additional specifications of error was not reasonably specific enough to effectively preserve the legality of the stop argument. In *Isaak v. Sprynczynatyk*, we concluded the phrase: "[a]ny other issues to be determined following a review of the hearing transcript" in a specifications of

error was boilerplate because it was "so general it could apply to any administrative agency appeal." 2002 ND 64, ¶¶ 4, 7, 642 N.W.2d 860. We similarly conclude Beylund's specifications of error attempting to reserve the right to make additional arguments after he received the administrative hearing transcript is "so general it could apply to any administrative agency appeal." *Id.* at ¶ 7. Accordingly, Beylund waived his argument regarding the legality of his stop; therefore, we decline to address it.

IV

[¶12] Beylund argues his right to be free of unreasonable searches and seizures, under the Fourth Amendment and N.D. Const, art. I, § 8, was violated by the chemical test of his blood, under the State's implied consent law. Without specifically referencing any statute, he claims his consent to take the test was involuntary because he was coerced by the statute's penalties, which criminalize refusal. Beylund does not allege any coercive circumstances, other than the penalties under N.D.C.C. ch. 39-20.

[¶13] Beylund relies in part on *Camara v. Mun. Court of the City & Cnty. of San Francisco*, 387 U.S. 523 (1967), to support his premise that the criminal refusal law violates the Fourth Amendment. In *Camara*, a city ordinance authorized city employees to enter any building in the city after presenting proper credentials, and provided for a criminal penalty if the owner refused. *Id.* at 526-27. The Supreme Court ruled the owner "had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

[¶14] As we recently discussed in *State v. Birchfield*, in the context of North Dakota's implied consent law challenges, this Court is not persuaded by *Camara*, and cases like it:

> Unlike the regulation in *Camara* which allowed for suspicionless searches of private property, implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge.

2015 ND 6, ¶ 15.

[¶15] Prior to *Birchfield*, this Court recently considered state and federal constitutional challenges of the State's implied consent law based on arguments that a driver is coerced by the penalty for refusal. In *McCoy*, this Court concluded "a driver's decision to agree to take a test is not coerced simply because an administrative penalty has been attached to refusing the test." 2014 ND 119, ¶ 21, 848 N.W.2d 659. In *State v. Smith*, we concluded the increased penalties under the State's implied consent law that went into effect in 2013, making refusal to take a test a crime, did not change our coercion analysis from *McCoy*. 2014 ND 152, ¶¶ 9, 16, 849 N.W.2d 599. Our analysis in *Smith* and *Birchfield* considers the same challenges Beylund brings under both the state and federal constitutions. Because Beylund alleges no other coercive circumstances, other than the penalties under N.D.C.C. ch. 39-20, we conclude he voluntarily consented to the blood test.

V

[¶16] Beylund also argues North Dakota's implied consent law violates the unconstitutional conditions doctrine because it conditions the privilege of driving on the relinquishment of the constitutional right to be free of unreasonable searches and seizures. This Court has not previously addressed Beylund's argument on the "unconstitutional conditions doctrine." *See Herrman*, 2014 ND 129, ¶ 12, 847 N.W.2d 768 (declining to address unconstitutional conditions argument); *McCoy*, 2014 ND 119, ¶ 28, 848 N.W.2d 659 (declining to address unconstitutional conditions argument).

[¶17] In *Birchfield*, we explained our standard of review in the context of a constitutional challenge to the State's implied consent law:

> Our standard for reviewing constitutional challenges to legislative enactments is well-established:
>
> The determination whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be de-

> cleared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt. The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity.

Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587 (internal citations omitted).

Driving is a privilege, not a constitutional right and is subject to reasonable control by the State under its police power. *See, e.g., State v. Smith*, 2014 ND 152, ¶8, 849 N.W.2d 599; *McCoy v. North Dakota Dep't of Transp.*, 2014 ND 119, ¶ 26, 848 N.W.2d 659. Under N.D.C.C. § 39-20-01(1), an individual who drives "is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test . . . ." A chemical test may be administered "only after placing the individual . . . under arrest." N.D.C.C. § 39-20-01(2). However, a driver has a right to refuse a chemical test under N.D.C.C. § 39-20-04(1), which provides, "If a person refuses to submit to testing under section 39-20-01 ... , none may be given." *See State v. Fetch*, 2014 ND 195, ¶ 8, 855 N.W.2d 389.

The criminal refusal provision is contained in N.D.C.C. § 39-08-01, which provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

. . . .

e. That individual refuses to submit to any of the following:

. . . .

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; . . .

2. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section . . . 39-20-01 . . . is guilty of an offense under this section.

Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general and in subsection 3 states that the "law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs" and "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence."

> The Fourth Amendment and N.D. Const. art. I, § 8, prohibit unreasonable searches and seizures, and the administration of chemical tests to determine alcohol concentration is a search for purposes of these constitutional provisions. *See Smith*, 2014 ND 152, ¶ 7, 849 N.W.2d 599; *McCoy*, 2014 ND 119, ¶ 10, 848 N.W.2d 659.

Birchfield, 2015 ND 6, ¶¶ 5-8. The United States Supreme Court has not decided, and it is a question of first impression, whether North Dakota's implied consent law represents an unconstitutional condition.

[¶18] Because we have not previously addressed the "doctrine of unconstitutional conditions," some background is helpful. Generally speaking, the doctrine provides the government ordinarily may not grant a benefit conditioned on the surrender of a constitutional right, even if the government may withhold the benefit altogether. 16A Am. Jur. 2d *Const. Law* § 411 (2009 & Supp. 2014). However, under the doctrine, the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable. *Id.* Therefore, even if the unconstitutional conditions doctrine applies to the Fourth Amendment, it does not necessarily mean a constitutional violation occurred.

[¶19] Beylund relies on *Frost v. Railroad Comm'n of State of Cal.*, which provides that a State, when granting privileges, "may not impose conditions which require the relinquishment of constitutional rights." 271 U.S. 583, 594 (1926). The *Frost* case involved regulation of private carriers and common carriers on the highways, and the constitutional

challenge was that the legislation deprived private carriers of their property without due process of law, and denied them equal protection in violation of the Fourteenth Amendment of the federal constitution. *Id.* at 589.

[¶20] As a preliminary matter, Beylund cites no authority that clearly supports his contention that the unconstitutional conditions doctrine applies to a constitutional challenge based on the Fourth Amendment. This Court has never applied the unconstitutional conditions doctrine in the context of the Fourth Amendment. Further, we are unaware of any instance where the Supreme Court has applied the unconstitutional conditions doctrine to the Fourth Amendment. *See Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 724-25 (Minn. Ct. App. 2014). In *United States v. Knights*, the United States Supreme Court mentioned, but did not apply the unconstitutional conditions doctrine, when it concluded warrantless searches of a home, as a condition of probation, were reasonable. 534 U.S. 112, 118 (2001). Rather, the Supreme Court determined the issue by applying the general Fourth Amendment approach of examining the totality of the circumstances. *Id.* However, the absence of a decision by the Supreme Court or this Court is not conclusive.

[¶21] Beylund cites to various cases, unrelated to the unconstitutional conditions doctrine, that support the premise that the Fourth Amendment generally protects a person's right to be free of warrantless searches, under various circumstances. *See District of Columbia v. Little*, 339 U.S. 1 (1950); *Camara*, 387 U.S. 523 (1967); *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). Additionally, Beylund cites to cases, unrelated to the Fourth Amendment, involv-

ing the unconstitutional conditions doctrine. *See Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004); *Hillcrest Prop., LLP v. Pasco Cnty.*, 939 F. Supp. 2d 1240 (M.D. Fla. 2013). Beylund contends *Dearmore v. City of Garland* applies the unconstitutional conditions doctrine to the Fourth Amendment. 400 F. Supp. 2d 894 (N.D. Tex. 2005). In this case, a Texas federal district court enjoined the enforcement of an ordinance that required an individual renting property to allow the city to inspect the property, as a condition of receiving a rental permit. *Id.* at 906. The trial court, in *Dearmore*, while not mentioning the unconstitutional conditions doctrine, imposed an injunction on Fourth Amendment principles regarding the voluntariness of consent, determining only that the ordinance was "likely to be held unconstitutional." *Id.* at 903-04. Beylund also contends *Lebron v. Sec'y of Florida Dep't of Children and Families*, 772 F.3d 1352 (11th Cir. 2014), applied the unconstitutional conditions doctrine to the Fourth Amendment. In *Lebron*, a requirement that all TANF applicants submit to suspicionless drug testing as a condition of receiving benefits was struck down. *Id.* at 1378. However, the case was not decided under the unconstitutional conditions doctrine, rather the case was decided using a "special needs" analysis generally applied to suspicionless searches. *Id.* We are not persuaded.

[¶22] Instead, we find instructive *Stevens*, 850 N.W.2d at 722-31 (refusing to apply unconstitutional conditions doctrine to a Fourth Amendment challenge of Minnesota's implied consent statutes) and *State v. Chasingbear*, No. A14-0301, 2014 WL 3802616, at *3-8 (Minn. Ct. App. Aug. 4, 2014) (holding lower court erred as a matter of law by applying unconstitutional conditions doctrine to Minnesota's

implied consent laws) (on appeal to the Minnesota Supreme Court at the time of this decision). *Stevens* and *Chasingbear* relied on *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), *abrogated in part by State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), in analyzing whether the unconstitutional conditions doctrine should apply. In *Netland*, the Minnesota Supreme Court indicated the unconstitutional conditions "doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *Netland*, at 211. In other words, in order to proceed with a claim of unconstitutional conditions, the defendant must show the criminal refusal statute authorizes an unconstitutional search. *Id.* at 212. While we may not agree entirely with the analysis in *Stevens* and *Chasingbear*, we agree that to prevail Beylund must show the statutes criminalizing refusal authorize an unconstitutional search.

[¶23] As the United States Supreme Court stated in *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), "[t]he touchstone of the Fourth Amendment is reasonableness." In *Birchfield*, we explained the considerations in determining reasonableness in the context of the implied consent law:

> [Reasonableness] [] is assessed by balancing the promotion of legitimate governmental interests with the intrusion on an individual's privacy. *State v. Adams*, 2010 ND 184, ¶ 15, 788 N.W.2d 619. There is no question "the State's interest in decreasing drunk driving is a valid public concern. Indeed, '[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-

> related death and mutilation on the Nation's roads are legion." *Martin v. North Dakota Dep't of Transp.*, 2009 ND 181, ¶ 7, 773 N.W.2d 190 (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement officers to submit to a chemical test. *See, e.g., [State v.] Yong Shik Won*, 332 P.3d [661,] 681 [Haw. Ct. App. 2014]; *Stevens v. Commissioner of Pub. Safety*, 850 N.W.2d 717, 728-29 (Minn. Ct. App. 2014); [*United States v.] Muir*, 2014 WL 4258701 at *6 [(D. Ct. MD., Aug. 28, 2014)].

2015 ND 6,¶ 17.

[¶24] Beylund has not pointed out any statute under North Dakota's implied consent laws that requires him to submit to a blood test contrary to the Fourth Amendment, in other words, an unreasonable search without a warrant or an exception to the warrant requirement. Under the facts of this case, Beylund consented to the test, and consent is an exception to the warrant requirement. *City of Fargo v. Wonder*, 2002 ND 142,¶ 20, 651 N.W.2d 665 (stating "[c]onsent is a recognized exception to the warrant requirement"). Second, if Beylund had refused the test, no search would have occurred. Law enforcement is not authorized to force a test as N.D.C.C. § 39-2004(1) specifically provides if a test is refused, "none may be given."

[¶25] Assuming Beylund has a constitutional right to refuse, it does not necessarily invalidate the implied consent law under the unconstitutional conditions doctrine. *See Chasingbear*, 2014 WL 3802616, at *6 (citing *Frost*, 271 U.S. at 591). "The unconstitutional conditions doctrine looks to the purpose of the challenged condition, and it invalidates only those laws whose challenged condition bears no significant relevance to the governmental objective of the privilege that the government is conditionally conferring." *Chasingbear*, 2014 WL 3802616, at *6. The record does not reflect any analysis of the purpose of the implied consent laws. However, it is not difficult to ascertain. The Supreme Court has repeatedly recognized the States' interest in public safety in removing drunken drivers from their highways. *See Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing that the interest in public safety is substantially served by summary suspension of driver's license by those who refuse to be tested upon arrest). As noted in *Mackey*, the sanction for refusal serves multiple purposes: 1) to serve as a deterrent to drunken driving; 2) as a strong inducement to take the test; and 3) to promptly remove drunk drivers from the road, which contributes to public safety. *Id.* at 18.

[¶26] In *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), the Supreme Court held a highway sobriety checkpoint did not violate the Fourth Amendment, despite the fact that a seizure of the vehicle occurred without reasonable suspicion for the stop. As noted in *Sitz*, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Id.* at 451. In *Sitz*, the Court balanced the State's interests in preventing drunken driving against the intrusion upon indi-

vidual motorists, and held the field sobriety checkpoints were consistent with the Fourth Amendment. *Id.* at 455.

[¶27] In *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (plurality decision), the Supreme Court reiterated drunk driving continues to be a significant problem. In *McNeely*, the Supreme Court rejected the notion that the natural dissipation of alcohol in the bloodstream established a per se exigency that would justify an exception to the warrant requirement. *Id.* at 1563. However, the Court noted:

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. . .. *Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. . . . *see also South Dakota v. Neville*, 459 U.S. 553, 554, 563-564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

Id. at 1566. It is clear that the State has a compelling state interest in regulating intoxicated drivers.

The next step of the analysis is to determine whether the State's interest in regulating intoxicated drivers is related to the privilege of driving in such a way that the implied consent statutes are reasonable.

[¶28] North Dakota's implied consent laws, like Minnesota's, "confers on drivers the privilege of *soberly* operating inherently dangerous motorized vehicles on the state's roadways . . . and, in exchange, each driver accepts a statutory choice," *Chasingbear*, 2014 WL 3802616, at *7. The choice is to consent to testing or face civil and criminal penalties equivalent or possibly less than those if convicted of driving under the influence. *See Birchfield*, 2015 ND 6, ¶ 17 (noting that driver may avoid enhanced penalties for being highly intoxicated by refusing chemical testing).

[¶29] As noted in *Birchfield*, a licensed driver has a diminished expectation of privacy with respect to the enforcement of drunk-driving laws, and our implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement to submit to a chemical test. *Id.* at ¶ 17.

[¶30] As we have explained in cases challenging the constitutionality of a statute:

> An Act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution. The justice, wisdom, necessity, utility and expediency of legislation are questions for the

> legislative, and not for judicial determination.

McCoy, 2014 ND 119, ¶ 27, 848 N.W.2d 659. As a result, the burden for overturning a statute is high, and we are not convinced the implied consent law is invalid under the unconstitutional conditions doctrine. Accordingly, Beylund's unconstitutional conditions argument fails, and we affirm the district court.

VI

[¶31] We conclude Beylund voluntarily consented to the chemical blood test. We further conclude North Dakota's implied consent law as challenged, either on its face or as applied, does not violate the Fourth Amendment of the United States Constitution applying either general Fourth Amendment principles or under the doctrine of unconstitutional conditions. Finally, we decline to address the arguments Beylund failed to include in his notice of appeal and specifications of error. The judgment is affirmed.

[¶32]

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20140133
Bowman County Case No. 2013-CV-00095

Appeal from the district court of Bowman County.

Steve Michael Beylund, Petitioner and Appellant

v.

Grant Levi, Director of the Department of Transportation, Respondent and Appellee

[¶1] This appeal having been heard by the Court at the September 2014 Term before:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers, and Justice Lisa Fair McEvers;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED.

[¶4] IT IS FURTHER ORDERED AND ADJUDGED that Grant Levi, Director of the Department of Transportation have and recover from Steve Michael Beylund costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

[¶5] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the

Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: February 12, 2015

By the Court:

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF BOWMAN	SOUTHWEST JUDICIAL DISTRICT

Steve Michael Beylund, Petitioner, vs. North Dakota Department of Transportation, Respondent.	MEMORANDUM OPINION AND ORDER Case No. 06-2013-CV-95

[1] This matter is an appeal, pursuant to N.D.C.C. §39-20-06, of the hearing officer's decision, on September 18, 2013, to suspend Steve Michael Beylund's driving privileges for a period of two years. This Court has reviewed the transcript of testimony including attached exhibits and has considered the briefs and the entire record on appeal4nthis matter. The decision of the Court is to AFFIRM the hearing officer's decision.

[2] An appeal from an administrative hearing officer's decision involving a license suspension under §39-20-04.1 is governed by the Administrative Agencies Practice Act and is civil in nature. See *Hammeren v. North Dakota State Highway Com'r*, 315 N.W.2d 679, 681 (N.D. 1982). The Court's role in reviewing the hearing officer's decision is limited to the consideration of the following questions:

1. Whether the order is in accordance with the law.
2. Whether the order violates the constitutional rights of the appellant.
3. Whether the provisions of chapter 28-32 have been complied with in the proceedings before the agency.
4. Whether the rules of procedure of the agency afforded the plaintiff a fair hearing.
5. Whether the findings of fact made by the agency are supported by a preponderance of the evidence.
6. Whether the conclusions of law and order of the agency are supported by its findings of fact.
7. Whether the findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. Whether the conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge. N.D.C.C. §28-32-46 (N.D. 2005).

N.D.C.C. § 28-32-46.

[3] In the process of reviewing the factual findings of an administrative agency "we do not make independent findings of fact or substitute our judgment for that of the agency. We determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record."

Bryl v. Backes, 477 N.W.2d 809, 811 (N.D.1991) (quoting *Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D.1979)). "This standard defers to the hearing officer's opportunity to hear the witnesses' testimony and to judge their credibility and we will not disturb the agency's findings unless they are against the greater weight of the evidence." *Johnson v. N.D. Department of Transportation*, 530 N.W.2d 359, 361 (N.D.1995).

[4] It is the Court's assessment from the entire record on appeal that there are two issues: (1) whether Beylund was illegally stopped; and (2) whether Beylund's consent to the chemical tests was coerced.

[5] Petitioner's first argument is that he was illegally stopped by Officer Brien. The Fourth Amendment of the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, and Article I, Section 8 of the North Dakota Constitution, protects against unlawful searches and seizures. *City of Mandan v. Gerhardt*, 2010 ND 112, ¶8, 783 N.W.2d 818. In *Gerhardt*, supra, the court stated that all searches and seizures must be reasonable and the Court provided the permissible types of law enforcement-citizen encounters it has identified:

> (1) arrests, which must be supported by probable cause; (2) *Terry* stops, see *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures. *Olson*, 2007 ND 40, ¶ 9, 729 N.W.2d 132; *Torkelsen*, 2006 ND 152, ¶ 10, 718 N.W.2d 22. This Court has also recognized that "it is not a seizure for an

> officer to walk up to and talk to a person in a public place." *Jerome*, 2002 ND 34, ¶ 5, 639 N.W.2d 478 (citing *State v. Steinmetz*, 552 N.W.2d 358, 359 (N.D.1996)). "Within the context of the Fourth Amendment, a seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *Olson*, at ¶ 9 (quoting Jerome, at ¶ 5).

City of Mandan v. Gerhardt, 2010 ND 112, ¶8, 783 N.W.2d 818. The *Gerhardt* case provides several defining characteristics of what constitutes a community caretaking encounter. *Gerhardt*, 2010 ND 112, ¶¶9-11, 783 N.W.2d at 821-23. The community caretaking function is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* quoting *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed. 706 (1973). A community caretaker encounter allows law enforcement-citizen contact, including stops, where an officer has no reasonable suspicion of criminal activity. *Gerhardt*, 2010 ND 112, ¶10, 783 N.W.2d at 822. However, there can be no community caretaking role for an officer where it is obvious that a citizen neither wants nor needs assistance. *Gerhardt*, 2010 ND 112, ¶11, 783 N.W.2d at 822.

[6] The *Gerhardt* Court also pointed out that "[t]he law distinguishes between law enforcement stopping a moving vehicle and approaching a vehicle that is already stopped." *Gerhardt*, 2010 ND 112, ¶10, 783 N.W.2d at 822, See also *State v. Franklin*, 524 N.W.2d 603, 604 (ND 1994) ("...it is not a seizure for an officer to walk up to and talk to a person in a public place, including a person in a parked car.") The

Gerhardt Court noted that "[e]ven a casual encounter, however, can evolve into a seizure when a reasonable person would view a law enforcement 'officer's actions–if done by another private citizen as threatening or offensive.'" *Id.* quoting *State v. Boyd*, 2002 ND 203, ¶7, 654 N.W.2d 392.

[7] Here Officer Brien testified at the administrative hearing that there had been a report of a suspicious vehicle in someone's yard north of Bowman and he was patrolling the Highway 85/Frontage Road for this vehicle. Tr. p. 6, 11. 22-25; p. 7, 11. 5-8. Officer Brien testified that he observed a light colored vehicle driven by an older male subject drive by where he was parked on the corner of Highway 85 and Frontage Road. Tr. P. 7, 11. 11-15. Officer Brien said "I didn't think anything of that at the time." Tr. p. 7, 11. 16-17. Officer Brien noticed the light-colored vehicle drive partially off the road, missing the driveway that goes to Sleepy Hollow Body Shop, almost strike a stop sign, and stop still parked partially on the highway. Tr. p. 7, 11. 18-22. Officer Brien testified he pulled up behind the light colored vehicle, which was later identified as Beylund's vehicle, without activating his emergency lights, and then walked up to Beylund's vehicle "...to make sure everything was fine with the individual or what was going on." Tr. p. 8, 11. 2-5.

[8] Officer Brien's actions are consistent with an officer conducting a community caretaking encounter. Officer Brien approached Beylund, who was already stopped, and inquired as to the parking arrangement of Beylund's vehicle in light of the potential hazard it created. It does not appear obvious in this situation that Beylund neither wanted nor needed assistance. A reasonable person probably would not have viewed

Officer Brien's actions as threatening or offensive. A vehicle parked in such a manner could just as easily have been a stranded motorist who either did not recognize the hazard of parking in such a way, or whose vehicle stalled and could not be moved to a place that was not hazardous. As such, this Court finds that Officer Brien's actions in regards to approaching Beylund was a valid community caretaker encounter and thus lawful.

[9] Petitioner's second and final argument is that he was coerced into consenting to the chemical tests because refusal of the tests is a crime in North Dakota and also appears to be arguing in general that the North Dakota Implied Consent law is a violation of his Fourth Amendment rights. Beylund asserts that in light of the United States Supreme Court decision in *Missouri v. McNeely*, a warrant is required for a search of the blood, breath, or urine; that the unconstitutional conditions doctrine as articulated in *Frost v. RR Comm'n* applies to his case such that he should not have to subject himself to the possibility of a chemical test in order to obtain a driver's license; and Beylund also asserts that holdings in the U.S. Supreme Court cases of *Schneckloth v. Bustamonte* and *Bumper v. North Carolina* suggest that his consent to the chemical tests was coerced.

[10] Petitioner's reliance on the *Missouri v. McNeely* decision is not persuasive. In *Missouri v. McNeely*, the United States Supreme Court considered the following issue: "Whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." *Missouri v. McNeely*, 133 S.Ct. 1552, 1557 (2013). The Court

held that the natural dissipation of alcohol in the blood may support a finding of exigency in specific cases, but it does not do so categorically. *McNeely*, 133 S.Ct at 1563. As such, the reasonableness of a warrantless blood test of a drunk driving suspect is determined on a case by case basis based on the totality of the circumstances. *Id.* In *McNeely* the drunk driving suspect refused the blood test after being read Missouri's Implied, Consent Advisory. *McNeely*, 133 S.Ct. at 1557. The officer took the suspect to a nearby hospital, without attempting to obtain a warrant, and had the suspect's blood drawn without the suspect's consent. *Id.*

[11] Here, Beylund consented to the breath and blood tests. McNeely concerns a nonconsensual intoxication test that was administered by law enforcement despite the DUI suspect's refusal. Because Beylund consented to the test, and, as such, the test was obtained in accordance with North Dakota law, the exceptions to the warrant requirement, including the existence or nonexistence of exigent circumstances, are not relevant here.

[12] Additionally, the Court would point out that the United States Supreme Court recognized the continued viability of implied consent laws in *McNeely*, supra at p. 1556, as a recognized exception to the warrant required in the absence of exigent circumstances. Thus, Beylund's argument in reliance on *McNeely* that the breath and blood tests he consented to were a violation of his Fourth Amendment rights is not persuasive.

[13] The Court does not find Beylund's argument regarding *Frost v. RR Comm'n* to be persuasive either. In *Frost v. RR Comm'n*, the Railroad Commission agreed that the plaintiffs in error were private carri-

ers but asserted they were nevertheless required as transportation companies to obtain a permit and a certificate declaring that public convenience and necessity require the exercise of such right or privilege to operate for compensation on public highways. *Frost v. RR Comm'n*, 271 U.S. 583, 590, 46 S.Ct. 605, 606 (1926). The Supreme Court stated the issue in the case as follows:

> In other words, the case presented is not that of a private carrier, who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier, but it is that of a private carrier, who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission.

Frost, 271 U.S. at 592, 46 S.Ct. at 606-07. The Court continues:

> Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given to Choice, except a choice between the rock and the whirlpool–an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

Frost, 271 U.S. at 593, 46 S.Ct. at 607. The Court reasoned that a state may place condition upon privileges it has the power to altogether deny; however,

that power has limits, and the state may not put in place such conditions which would require the relinquishment of constitutionally protected rights. *Frost*, 271 U.S. at 593-94, 46 S.Ct. at 607.

[14] The *Frost* case describes the limitation on states to impose conditions on constitutionally protected rights. For example, in *Frost*, at issue was the Plaintiff's right to perform its transportation contract using the public highways of California without having to become designated as a "common carrier," including all the burdens placed upon having that designation. Here, Beylund asserts that because he has to agree to the possibility that his blood, breath, or urine could be tested in order to have the privilege of a driver's license in North Dakota, he has been subjected to an unconstitutional condition. The Court is not persuaded that the Implied Consent law of North Dakota places an unconstitutional condition on those who obtain driver's licenses. The law does not require one to give up his Fourth Amendment rights. One is always free to refuse the chemical tests. Thus, Beylund's reliance on *Frost* is not persuasive.

[15] Beylund has asserted that his consent to the breath and blood tests was coerced because refusing the test is a crime in North Dakota. Beylund cites US Supreme Court holdings in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and *Bumper v. North Carolina*, 391 U.S. 543 (1968) to support his argument that his consent to the chemical tests was coerced. The Court does not find this argument persuasive.

[16] The Court would point out the recently decided Minnesota Supreme Court case *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). Absent precedent in North Dakota regarding this matter, this Court finds this

Minnesota case based on similar facts and law to be persuasive.

[17] The issue in *State v. Brooks* was whether Brooks' Fourth Amendment rights were violated when police took blood and urine samples from him without first obtaining a search warrant during three separate drunk-driving investigations. *State v. Brooks*, 838 N.W.2d 563, 565 (Minn. 2013). The district court convicted Brooks in all three cases of drunk driving and Brooks appealed each of them. *Brooks*, 838 N.W.2d at 566-67. The Minnesota Court of appeals upheld the convictions, relying on Minnesota precedent which held that the evanescence of alcohol in the body created exigent circumstances allowing police to search drivers suspected of drunk driving without a warrant. *Brooks*, 838 N.W.2d at 567.

[18] On appeal to the Minnesota Supreme Court, Brooks argued that, in light of *McNeely*, the warrantless search of his blood and/or urine could not be upheld based on the exigency caused by the dissipation of alcohol in the body. *Id.* The Court agreed, but upheld Brooks' convictions on other grounds. The Minnesota Supreme Court held that "[b]ecause we conclude that Brooks consented to the searches at issue, and thus that a warrant was unnecessary, we affirm." The Minnesota Supreme Court summed up its opinion as follows:

> As a threshold matter, Brooks's argument is inconsistent with the Supreme Court's discussion of implied consent laws in *McNeely*. As the Supreme Court recognized in *McNeely*, implied consent laws, which "require motorists, as a condition of operating a motor vehicle within the State, to consent to

> [blood alcohol concentration] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense," are "*legal tools*" states continue to have to enforce their drunk driving laws. ---U.S. at ---, 133 S.Ct. at 1566 (plurality opinion) (emphasis added). The Court noted that these laws typically require suspected drunk drivers to take a test for the presence of alcohol and mandate that a driver's license will be revoked if they refuse a test. *Id.* By using this "legal tool" and revoking a driver's license for refusing a test, a state is doing the exact thing Brooks claims it cannot do-conditioning the privilege of driving on agreeing to a warrantless search.
>
> Even more importantly, however, we do not hold that Brooks consented because Minnesota law provides that anybody who drives in Minnesota "consents...to a chemical test." See Minn.Stat. §169A.51, subd. 1(a). Rather, we hold that Brooks consented based on our analysis of the totality of the circumstances of this case. For that reason, *State v. Henning*, 666 N.W.2d 379 (Minn. 2003), on which Brooks relies, is inapposite.

Brooks, 838 N.W.2d at 572-573.

[19] Brooks argued that he did not actually consent to the tests; instead, he only agreed to the tests because refusal is a crime and that any consent based on an implied consent statute is unconstitutional. The Minnesota Supreme Court disagreed. It said, "[b]ased on the analysis in *Neville* and *McDonnell*, a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Brooks*, 838

N.W.2d at 570. See also *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991) and *South Dakota v. Neville*, 459 U.S. 553, 564, 103 S.Ct. 916 (1983) (these cases deal with Fifth Amendment rights in regards to such Implied Consent laws and the *Brooks* court extended that reasoning to address Brooks' Fourth Amendment issues). The Court stated:

> Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test "will not be an easy or pleasant one for a suspect to make," the criminal process "often requires suspects and defendants to make difficult choices." *Neville*, 459 U.S. at 564, 103 S.Ct. 916.

Brooks, 838 N.W.2d at 571.

[20] In *Brooks* there was no dispute as to whether the police properly followed statutory requirements for the arrest nor whether, as a factual issue, he agreed to the tests. *Brooks*, 838 N.W.2d at 569. The Minnesota Supreme Court ultimately applied the "totality of the circumstances" test to determine whether Brooks' consent was indeed voluntary. *Brooks*, 838 N.W.2d at 568-69, 572.

[21] "The Court's analysis suggests it was unwilling to find that the refusal statute, as a stand-alone factor, rendered consent to a chemical test coerced. The Court instead held that consent obtained by reading a drunk-driving suspect the Implied Consent Advisory (including the "refusal is a crime" portion) is subject to the "totality of the circumstances" test just

like other instances where consent is alleged to have been coerced.

[22] In *Brooks*, the Court analyzed the following factors in its "totality of the circumstances" test: (1) the fact that Brooks was under arrest was not dispositive because he was not subjected to repeated questioning from law enforcement or asked to consent to the test after spending days in police custody; (2) Brooks consulted with counsel each time before agreeing to take each test such that his attorney could serve as an advisor to explain the alternative choices; and (3) law enforcement made it clear to Brooks that he had a choice whether to take the test or refuse it.

[23] Absent North Dakota authority on this issue, the Court finds the *Brooks* opinion persuasive. The Court finds there is no bright line rule in a case such as this. The reading of an implied consent/refusal statute in and of itself does not indicate automatic coercion regarding consent to a chemical test. Seeing no reason the coerced consent issue should be analyzed differently, this court turns to current North Dakota precedent regarding consent and coercion, which indicates that the "totality of the circumstances" approach is the appropriate method with which to assess whether consent was coerced. See *State v. Morrin*, 2012 ND 75, ¶7, 815 N.W.2d 229, which provides:

> Consent is a recognized exception to the warrant requirement. *Id.* at ¶ 9. The district court must determine if the consent was voluntary under the totality of the circumstances. *State v. Avila*, 1997 ND 142, ¶ 16, 566 N.W.2d 410. To be voluntary, the consent must not be coerced by explicit or implicit methods or through implied threats or covert

> force. Id. The existence or absence of certain factors concerning the condition and characteristics of the individual at the time of consent and the details of the setting in which consent was obtained are significant in determining voluntariness, but no one factor is dispositive. *Id.* "[T]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, rather than merely showing that the person took no affirmative actions to stop the police from entering." *Id.* at ¶17.

[24] There were other factors involved in *Brooks*, such as Brooks discussing the matter with his attorney, unlike in Beylund's case, that weighed in favor of finding consent. Although this appears to be true, the holding in *Brooks* indicates the reading of an implied consent/refusal advisory is only one factor in the totality of the circumstances test for coercion as a whole, and that it does not serve as a stand-alone factor automatically making consent coerced.

[25] Beylund has failed to allege any other factors that might suggest his consent was coerced, aside from the reading of the Implied Consent/Refusal law itself. Beylund failed to assert that any implied threats or covert force was used in obtaining his consent. Assessing the totality of the circumstances, this Court is not persuaded that Beylund was coerced into consenting to the chemical tests of his breath and blood.

[26] Therefore, for the reasons discussed above, it is the ORDER of this Court that the decision of the hearing officer is hereby AFFIRMED.

Dated this 3 day of Feb, 2014.

BY THE COURT:

William Herauf
District Judge

CERTIFICATE OF SERVICE

The undersigned, Deborah Sheets, does hereby certify that on February __ 2014, she caused copies of the above document to be emailed to the following:

Thomas Murtha
Douglas B. Anderson

Deborah, Sheets

APPENDIX C

STATE OF NORTH DAKOTA	**IN DISTRICT COURT**
COUNTY OF BOWMAN	**SOUTHWEST JUDICIAL DISTRICT**
Steve Michael Beylund, Appellant/Petitioner; vs. Grant Levi, Director of the North Dakota Department of Transportation, Appellee/Respondent.	**JUDGMENT** **Civil No. 06-2013-CV-00095**

[¶1] The Court, having ordered judgment entered in this action,

[¶2] IT IS HEREBY ORDERED AND ADJUDGED that the decision of the administrative hearing officer suspending appellant's driving privileges for two years is affirmed.

[¶3] IT IS FURTHER ORDERED AND ADJUDGED that neither attorneys' fees nor costs are awarded to either party.

[¶4] WITNESS, the Honorable William Herauf, District Judge, and my hand and the seal of the Court this 10th day of February, 2014.

/s/

Jan Werre
Clerk of District Court

APPENDIX D

HEARING OFFICER'S DECISION

North Dakota Department of Transportation, Legal Division
SFN 9342 (REV 8-06)

Name of Petitioner	When hearing held	Operator's License Number
BEYLUND, STEVE MICHAEL	9/18/2013	BEY-49-7341
Address of Petitioner	**Attorney**	**County of Occurrence**
1208 3RD AVE NE, BOWMAN, ND 58623	THOMAS F. MURTHA	BOWMAN

Date of Birth	Date of Occurrence	Date of Temporary Operator's Permit	Issuing Agency
4/7/1949	8/10/2013	8/19/2013	BOWMAN POLICE DEPT

FINDINGS OF FACT

Officer Brien was dispatched to a call of an unwanted person. While in route, the vehicle left the property. Officer Brien observed a vehicle that matched the description given and pulled in behind the vehicle. At about 9:00PM, the vehicle made a right hand turn into a driveway, narrowly missing a stop sign and then stopping with his vehicle still partially in the roadway. Officer Brien stopped behind him and approached the vehicle. Upon approaching the vehicle, Officer Brien noticed an empty wine glass in the middle console, and an odor of alcohol coming from the vehicle. The driver, later identified as Mr. Beylund said he had missed his turn. Officer Brien had Mr. Beylund move his vehicle off the road and then asked him to exit the vehicle. Mr. Beylund did not want to exit his vehicle and waited until Officer Brien opened his door and commanded him to exit before exiting. While exiting the vehicle, Mr. Beylund stumbled and grabbed the door for support.

Mr. Beylund moved to the back of his vehicle. Mr. Beylund displayed poor balance. Mr. Beylund did not follow instructions, and had injuries so all field sobriety tests were refused. Mr. Beylund said that he would take an onsite screening test but failed to provide an adequate breath sample despite several attempts. Officer Brien told Mr. Beylund he was under arrest for driving while under the influence of alcohol. Mr. Beylund was arrested at 9:51PM. Mr. Beylund was very uncooperative and refused to get into the patrol vehicle. Once he had been placed in the patrol vehicle, Mr. Beylund was transported to the hospital. At the hospital Officer Brien read the implied consent advisory. Mr. Beylund agreed to take a chemical blood test. A blood sample was collected by an authorized person at 9:44PM. The sample was submitted to the state lab, according to the approved procedure. At the state lab, the blood sample was analyzed by a qualified analyst, on an approved device, according to the approved method. The test was fairly administered. The test results obtained showed an alcohol concentration of 0.250 g/100mL. The report and notice was issued.

CONCLUSIONS OF LAW

Officer Brien had reasonable grounds to believe Mr. Beylund had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of NDCC section 39-08-01 or equivalent ordinance. Mr. Beylund was placed under arrest and tested in accordance with NDCC section 39-20-01 and section 39-20-02. The test results show Mr. Beylund had an alcohol concentration of at least eighteen one-hundredths of one percent by weight.

DECISION: Suspend for 2 Years

NOTICE: If this decision is to suspend or revoke, it constitutes the official notice of the action against your driving privileges by the NDDOT Director of this date.

Date: 9/18/2013

/s/

SARAH A. HUBER, Hearing Officer
NDDOT, 608 E. BLVD AVE,
BISMARCK, ND 58505
(701) 328-4320

TEMPORARY PERMIT: This document is not valid as a temporary permit

Reason: Decision Mailed.

Date: 9/18/2013

/s/

Signature of Hearing Officer

The undersigned certifies that on 9/18/2013 a true and correct copy of this document was sent by mail, United States postage prepaid, or was sent by email, to the following persons:

OFFICER SHAWN BRIEN #1821, BOWMAN POLICE DEPT., P.O. BOX 12, BOWMAN, ND 58623

STEVE MICHAEL BEYLUND, 1208 3RD AVE NE, BOWMAN, ND 58623

THOMAS F. MURTHA, ATTORNEY AT LAW, P.O. BOX 1111, DICKINSON, ND 58602

/s/

Signature of Hearing Officer

APPENDIX E

SUPREME COURT OF NORTH DAKOTA
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Bismarck, ND 58505-0530
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supclerkofcourt@ndcourts.gov

VIA E-MAIL ONLY

March 24, 2015

Thomas F. Murtha IV
135 Sims, Suite 217
P.O. Box 1111
Dickinson, ND 58602-1111

RE: Reylund v. Levi
Supreme Court No. 20140133
Bowman Co. No. 2013-CV-00095

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,
/s/
Penny Miller
Clerk
North Dakota Supreme Court

pc: Douglas Bruce Anderson
The Honorable William Herauf

No. 14-1507

In The
Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, Director, North Dakota Department of Transportation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

North Dakota, like many other states, makes it an offense for a motorist, who has been arrested for driving under the influence, to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The North Dakota Supreme Court held that the refusal statute does not violate a driver's rights under the Fourth Amendment. The question presented is:

Whether North Dakota's implied-consent laws and refusal statute violate a motorist's rights under the Fourth Amendment when the motorist either consents to a chemical test or refuses to submit to a test and no test is administered.

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JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with the constitutional provision contained in the Petition. The Respondent also agrees with the statutory provisions contained in the Petition but adds the following:

North Dakota law, N.D.C.C. § 39-20-01 (2013) provides in relevant part:

> 1. Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath or urine. As used in this chapter, the word "drug" means any drug or substance or combination of drugs or substances which renders an individual incapable of safely driving, and the words "chemical tests" or "chemical analysis" mean any test to determine

the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, approved by the director of the state crime laboratory or the director's designee under this chapter.

2. The test or tests must be administered at the direction of a law enforcement officer only after placing the individual, except individuals mentioned in section 39-20-03, under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest.

3. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a

> minimum of one hundred eighty days and up to three years of the individual's driving privileges. The law enforcement officer shall determine which of the tests is to be used.

STATEMENT OF THE CASE AND FACTS

On August 10, 2013, at approximately 9:00 p.m., a Bowman Police Officer responded to a report of a suspicious vehicle in an individual's yard. While searching for the vehicle that had left the property, the officer observed a vehicle matching the reported description.

The police officer observed the vehicle nearly hit a stop sign while making a right hand turn into a driveway. The vehicle then stopped, partially in the roadway.

The officer pulled up behind the vehicle without activating the patrol car's emergency lights and walked up to the driver's side of the vehicle to make sure everything was fine with the individual and to see what was going on. Upon making contact with the motorist, later identified as Beylund, the officer observed an empty wine glass in the center console and an odor of an alcoholic beverage coming from inside the vehicle. Beylund's eyes were red and his speech was slurred.

Because the vehicle was partially sitting on the roadway, the officer activated his yellow amber lights

as a caution to other motorists. The officer then had Beylund pull his vehicle forward so it would be off the roadway.

After attempting to administer the horizontal gaze nystagmus test, which Beylund would not complete, the officer informed Beylund of the implied-consent advisory and requested he submit to an onsite screening test. Beylund attempted to blow into the onsite screening device at least three times but he did not give a proper air sample.

The officer arrested Beylund for driving under the influence of alcohol. Although he did not get a test result on the onsite screening test, the officer did not consider Beylund's lack of performance to be a refusal.

The officer asked Beylund to submit to a blood test at the Bowman hospital where he again informed Beylund of the implied-consent advisory including the provision that if he refused he would be charged with a crime. Beylund agreed to submit to a chemical test of his blood. The result of the blood test established Beylund had a blood alcohol concentration of 0.25% by weight.

On appeal to the district court, the district court affirmed the hearing officer's decision, finding Beylund's reliance on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) to be unpersuasive, and found Beylund voluntarily consented to the chemical breath test. The district court also found that North Dakota's chemical test refusal statute, as a stand-alone factor, did not

render Beylund's consent to a chemical test coerced. Assessing the totality of the circumstances, the district court was unpersuaded that Beylund was coerced into consenting to the chemical test.

The North Dakota Supreme Court reviewed and concluded Beylund voluntarily consented to the chemical blood test. The court relied on its earlier decision in *State v. Birchfield*, 858 N.W.2d 302 (N.D. 2015), *pet. for cert. filed*, No. 14-1468 in ruling that the state's implied-consent law and refusal statute were not coercive. The court further determined that North Dakota's implied-consent law did not violate the unconstitutional conditions doctrine. *Beylund v. Levi*, 859 N.W.2d 403, 414 (N.D. 2015).

Beylund requests this Court grant certiorari in *Bernard v. Minnesota*, No. 14-1470, and *Birchfield v. North Dakota*, No. 14-1468, and requests his petition be held pending the decision of those two cases. Pet. 3. Beylund cites the reasons described in the *Birchfield*[1]

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[1] The *Birchfield* petitioner asserts that the North Dakota Supreme Court relied on the Minnesota intermediate appellate decision in *State v. Bernard*, 844 N.W.2d 41 (Minn. Ct. App. 2014), for the proposition that the criminal-refusal statute is constitutional whenever an officer could have secured a warrant. *Birchfield* Pet. 5. That is not correct. This same argument was made in a subsequent case before the North Dakota Supreme Court and the court explained, "our decision in *Birchfield* was not based solely on the Minnesota Court of Appeals decision in *Bernard*." *State v. Kordonowy*, 867 N.W.2d 690, 693 (N.D. 2015). The North Dakota Supreme Court here was simply setting out the Minnesota appellate court's reasoning.

petition as the reasons for granting certiorari in his case. Pet. 3. For this reason Respondent will limit its response to the Petition in *Birchfield*.

REASONS FOR DENYING THE PETITION

In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), this Court said that "States have a broad range of tools to enforce their drunk-driving laws and to secure [Blood Alcohol Content] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566. The very first example the Court offered was "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* And, of particular relevance here, the Court explained that "[s]uch laws impose significant consequences when a motorist withdraws consent," such as revoking the driver's license and using "the motorist's refusal to take a BAC test as evidence against him in a subsequent criminal prosecution." *Id.* Every State has enacted such a law, and these laws have long withstood legal attack. *Id.* (citing *South Dakota v. Neville*, 459 U.S. 553 (1983)).

In 13 States, the "significant consequence[ ]" of a motorist's withdrawal of consent, after he is arrested on probable cause of committing a drunk-driving offense, is that the withdrawal is an independent misdemeanor offense, unless it is for a fourth violation

of N.D.C.C. § 39-08-01.[2] Some motorists have challenged those laws, but the appellate courts – spanning cases before and after *McNeely* – have uniformly rejected those challenges. This Court's intervention is therefore not needed, and certiorari is not warranted.

I. The North Dakota Supreme Court's decisions in *Beylund* and *Birchfield* do not conflict with any decisions by other state or federal appellate courts.

The *Birchfield* petitioner tries to create the specter of a conflict among the Courts (*Birchfield*, Pet. 11), but as his counsel concedes in the reply brief in *Bernard v. Minnesota*, No. 14-1470 (filed June 16, 2015), no direct conflict exists. *See* Reply Brief, *Bernard v. Minnesota*, No. 14-1470, at 5 (Minnesota's "observ[ation] that there is no square conflict" is "correct"); *id.* at 6 ("Even absent a direct conflict in the lower courts, these erroneous rulings should be corrected by this Court."); *id.* ("[E]xpress conflict or not, ").

The reason for counsel's concession is plain: All the appellate courts that have addressed challenges

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[2] The *Birchfield* petitioner asserts that "[a] first refusal to consent to a chemical test qualifies as a misdemeanor under N.D.C.C. § 39-08-01(1), while subsequent offenses may qualify as a felony." *Birchfield*, Pet. 3. That statement does not fairly convey how the law operates. Under N.D.C.C. § 39-08-01(4), first and second violations under § 39-08-01 in a seven-year period are class B misdemeanors, a third offense in a seven-year period is a class A misdemeanor, and only a fourth and subsequent offense is a class C felony.

to laws similar to North Dakota's implied-consent and criminal-refusal statutes have rejected them. For example, in *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *pet. for cert. filed*, No. 14-1470, the Minnesota Supreme Court upheld Minnesota's refusal statute. After police arrested Bernard for driving while impaired, he refused to take a breath test. Bernard alleged that Minnesota's test-refusal statute violated substantive due process and the Fourth Amendment, but the court disagreed. The court reasoned that a breath test of Bernard would have fallen within the search-incident-to-arrest exception of the Fourth Amendment. *Id.* at 766. The court then rejected Bernard's substantive due process claim, ruling that because a warrantless search of Bernard's breath incident to his arrest would have been constitutional, he had no fundamental right to refuse a constitutional search. *Id.* at 773.

1. The Ninth Circuit and the intermediate courts of appeals of Alaska, Hawaii, and Virginia have reached the same conclusion. The Alaska Court of Appeals and the Ninth Circuit both addressed a challenge by one Peter Burnett to Alaska's criminal-refusal statute. Burnett pleaded no contest to a charge of refusing a breathalyzer test, but reserved the right to challenge the constitutionality of the statute on appeal. On direct review, the Alaska Court of Appeals rejected his challenge after concluding that a breathalyzer is a reasonable search incident to arrest. *Burnett v. Municipality of Anchorage*, 678 P.2d 1364 (Ala. Ct. App.), *cert. denied*, 469 U.S. 859 (1984). The Ninth Circuit later rejected Burnett's request for

habeas relief, holding that there is no Fourth Amendment right to refuse to submit to testing. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986). The court stated, "No rights were relinquished here, however, because there is no Fourth Amendment right to refuse a breathalyzer examination." *Id.* at 1450.

The Hawaii Court of Appeals upheld that state's criminal-refusal statute in *State v. Yong Shik Won*, 332 P.3d 661 (Haw. Ct. App.), *cert. granted*, *State v. Yong Shik Won*, 2014 WL 2881259 (Haw. June 24, 2014). The court reasoned that, "[i]n balancing the government's interest against the individual's privacy interest, . . . obtaining a driver's breath test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment." 332 P.3d at 681.

Likewise, the Virginia Court of Appeals rejected a constitutional challenge to its criminal-refusal statute, Va. Code Ann. § 18.2-268.3. *See Rowley v. Commonwealth*, 629 S.E.2d 188 (Va. Ct. App. 2006). The court recognized the general rule that a search authorized under an implied-consent statute is valid: "The general rule applies here because Rowley, like all drivers, consented to submit breath samples by exercising the legal privilege of driving on the Commonwealth's roads." *Id.* at 191. Agreeing with *Burnett*'s conclusion that there "is no Fourth Amendment right to refuse a breathalyzer examination," the court held that it follows that there is "no Fourth Amendment violation in punishing a DUI suspect for refusing

to provide a breath sample under Code § 18.2-268.3." *Id.* (quoting *Burnett*, 806 F.2d at 1450).

Finally, the Ohio Supreme Court rejected a Fourth Amendment challenge to a similar statute, Ohio Rev. Code § 4511.19(A)(2), which increased the criminal penalty that may be imposed for driving under the influence if the motorist refused to submit to a chemical test. *See State v. Hoover*, 916 N.E.2d 1056, 1060-1061 (Ohio 2009), *cert. denied*, 559 U.S. 1093 (2010). The Ohio Supreme Court, noting that "the request to submit to a chemical test does not occur until after probable cause to arrest exists," held that the statute does not violate the Fourth Amendment. *Id.* at 1061.

2. In *Beylund*, the North Dakota Supreme Court held, N.D.C.C. §§ 39-08-01(1)(e) and 39-20-01 do not unconstitutionally coerce consent. Beylund exclusively relies on the petition in *Birchfield*, yet neither he nor the *Birchfield* petitioner alleges any coercive circumstances other than the penalties under North Dakota law.[3] In *State v. Brooks*, 838 N.W.2d 563

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[3] Beylund requests his Petition be held pending the disposition of *Birchfield v. North Dakota*, No. 14-1468 and *Bernard v. Minnesota*, No. 14-1470 and notes his Petition along with several others currently before this Court all present a question of whether a state may criminalize a refusal to consent to a chemical test of the person's blood, breath, or urine. Pet. 3. In this case, and in the following cases, the motorists were found to have consented to chemical tests and their Fourth Amendment rights were not implicated: *Culver v. Levi*, 861 N.W.2d 172 (N.D. 2015), *pet. for cert. filed*, No. 14-1508; *State v. Harns*, 861 N.W.2d 173

(Continued on following page)

(Minn. 2013), a post-*McNeely* opinion, the Minnesota Supreme Court addressed the question whether police violated Brooks' Fourth Amendment rights when they took blood and urine samples from him without a search warrant. This Court had previously granted a writ of certiorari in *Brooks* and remanded the case back to the Minnesota state court for consideration in light of this Court's decision in *McNeely*. *See Brooks v. Minnesota*, 133 S. Ct. 1996 (2013).

In *Brooks*, the police officer provided the driver with Minnesota's implied-consent advisory, which includes the advisory that refusal to submit to chemical testing is a crime. Although Brooks consented to the chemical testing, he argued his consent was unlawfully coerced because of Minnesota's refusal statute, *i.e.*, that if he refused to submit to testing, he could be charged with a crime and, therefore, his consent was not valid. *Brooks*, 838 N.W.2d at 570.

The Minnesota Supreme Court in *Brooks*, like this Court in *McNeely*, looked to the Court's Fifth Amendment case, *Neville*, and one of its own Fifth Amendment cases, *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991), in its Fourth Amendment analysis:

> *Neville* and *McDonnell* examine the issue of coercion within the context of the Fifth Amendment privilege against self-incrimination. But the question in both cases was whether

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(N.D. 2015), *pet. for cert. filed*, No. 14-1512; and *Wojahn v. Levi*, 861 N.W.2d 173 (N.D. 2015), *pet. for cert. filed*, No. 15-129.

> the existence of a consequence for refusing to take a chemical test rendered the driver's choice involuntary. *See Neville*, 459 U.S. at 562-63, 103 S.Ct. 916; *McDonnell*, 473 N.W.2d at 855-56. We address the same question in the context presented here when we examine whether Brooks's consent was voluntary, as the State argues, or whether it was coerced, as Brooks argues. *See Harris*, 590 N.W.2d at 102 (Minn. 1999) (explaining that consent to search becomes involuntary when the encounter with police becomes "coercive"). *Based on the analysis in Neville and McDonnell, a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test.*

Brooks, 838 N.W.2d at 570 (footnote omitted) (emphasis added).

As in *Brooks*, here Beylund was given the option of taking or refusing the requested chemical test, and he voluntarily agreed to submit to the test. No improper coercion was used. The North Dakota Supreme Court correctly concluded "consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer's reading of the implied-consent advisory that accurately informs the arrestee of the consequences of refusal, including the administrative and criminal penalties, and presents the arrestee with a choice." *Birchfield*, 858 N.W.2d at 306.

The Wisconsin Court of Appeals has also held true statements from a law enforcement officer do not constitute coercion.

> However, the arresting officer, by reading the informing the accused form, simply stated the truth: If Walitalo refused to submit to a chemical test, his driving privileges would be revoked. This statement did not involve any deceit or trickery, but instead accurately informed Walitalo of his precise legal situation. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 8.2(c) at 653-52 (3d ed. 1996). While police cannot use deceit or trickery, they are entitled to make true statements.

Vill. of Little Chute v. Walitalo, 650 N.W.2d 891, 894 (Wis. Ct. App. 2002).

"Where, as here, consent is obtained after informing a driver of actual legal consequences, the consent, if freely given, is valid. The accurate statement would not involve deceit. Police cannot use deceit, but they are entitled to make truthful, accurate statements." *City of Kingman v. Lubbers*, 65 P.3d 1075, 1077 (Kan. App. 2003).

In the end, the only purported "conflict" the *Birchfield* petitioner can muster is different reasoning used by the lower courts in reaching the same conclusion. But "[t]his Court reviews judgments, not statements in opinions," *Camreta v. Greene*, 131 S. Ct. 2020, 2037 (2011) (internal quotation marks omitted), and the judgments have been uniform. Implied-consent and criminal-refusal laws are a longstanding part of the States' legal landscape, and their validity is well established. There is no need for this Court's intervention.

II. The North Dakota Supreme Court's decisions in *Birchfield* and *Beylund* do not conflict with any decisions by this Court.

In the end, both Beylund and the *Birchfield* petitioner seek this Court's review because they disagree with the North Dakota Supreme Court's decisions. Even if that were a sufficient basis for certiorari – and it is not – it would not justify review. The North Dakota Supreme Court's decisions are consistent with this Court's precedents interpreting the Fourth Amendment.

1. The *Birchfield* petitioner contends the lower court's ruling would essentially read *McNeely* "off the books." *Birchfield*, Pet. 10. That incorrectly characterizes that decision. In *McNeely*, this Court held the natural metabolization of alcohol in the blood stream does not present a *per se* exigency that "justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. Rather, the "exigency . must be determined case by case based on the totality of the circumstances." *Id.* *McNeely*'s holding is therefore straightforward and limited – it applies only to driving-under-the-influence cases in which law enforcement, without obtaining a warrant and absent an exigency based on the totality of the circumstances, compels chemical testing after an individual has refused to submit to chemical testing.

The Court recognized, however, that "drunk driving continues to exact a terrible toll on society"

and provided reassurance that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." 133 S. Ct. at 1565-1566. In particular, the Court pointed to the fact that

> all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent. . . .

133 S. Ct. at 1566 (citations omitted). Nowhere in *McNeely*, therefore, did this Court hold or suggest that implied-consent refusal laws are unconstitutional or that a State may not sanction a motorist who withdraws the consent he had impliedly given.

Leaving the North Dakota Supreme Court's decision in place would not result in "sweeping warrantless searches" (*Birchfield*, Pet. 8) because, as the court recognized, "[i]f a person refuses to submit to testing under section 39-20-01 . . , none may be given." *Birchfield*, Pet. App. 4a. Once the person withdraws his implied consent, no search may be conducted (absent an exigency). And beyond that, the North Dakota law applies only to persons who have been arrested based on probable cause to believe they are driving under the influence – a limitation *Birchfield*'s petition often ignores. *E.g.*, *Birchfield*, Pet. 7

("the question [is] whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search").

For similar reasons, the *Birchfield* petitioner's reliance on *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523 (1967), is misplaced. *Camara* addressed a provision of a local housing code that authorized all city employees to enter "any building, structure, or premises in the [c]ity" and made it a crime to refuse such entry. *Id.* at 526-527 (quoting § 503 of San Francisco Housing Code). As the North Dakota Supreme Court correctly recognized (Pet. App. 12a-13a), *Camara* is distinguishable in multiple ways.

The regulation at issue in *Camara* applied even where government officers lacked any suspicion of wrongdoing; it allowed for suspicionless searches of every building in the city. *Id.* at 526. In addition, that regulation did not involve motor vehicles, which are "the subject of pervasive regulation by the State"; "[e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York v. Class*, 475 U.S. 106, 113 (1986). Further, "[u]nlike the regulation in *Camara*, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." Pet. App. 13a.

2. In order for consent to be voluntary, it cannot be the product of any "duress or coercion, express or

implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). But this Court is not troubled by providing motorists arrested for driving under the influence with a hard choice. "[T]he criminal process often requires suspects and defendants to make difficult choices." *Neville*, 459 U.S. at 564. Because the State's "offer of taking a blood alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *Id.* at 563.

The test of voluntariness is whether a defendant's will has been "overborne" or his "capacity for self-determination critically impaired." *Id.* at 225. "Voluntariness is not, however, 'to be equated with the absolute absence of intimidation,' for under this test virtually no statement would be voluntary." *United States v. Pelton*, 835 F.2d 1067, 1072 (4th Cir. 1987).

"Truthful statements are not the type of 'coercion' that threatens to render a statement involuntary. As the Supreme Court has observed, no statements would qualify as voluntary under such a standard, for 'very few people give incriminating statements in the absence of official action of some kind.'" *Pelton*, 835 F.2d at 1073 (quoting from *Schneckloth*, 412 U.S. at 224). Beylund did not testify at the administrative hearing that he felt coerced into submitting to the blood test due to law enforcement's reading of the implied-consent advisory. Therefore, this Court lacks jurisdiction to address this issue

because Beylund did not properly raise a factual basis for this argument.

3. Beylund and the *Birchfield* petitioner also argue that North Dakota's refusal statute violates the unconstitutional conditions doctrine. Pet. 4; *Birchfield*, Pet. 9. In *Beylund*, the North Dakota Supreme Court recognized that whether North Dakota's implied-consent law represents an unconstitutional condition was an issue of first impression. 859 N.W.2d at 410. After first addressing the doctrine, the state court noted this Court has not applied the unconstitutional conditions doctrine to the Fourth Amendment. *Id.* Then relying on this Court's opinion in *McNeely* and several other state court decisions the court "conclude[d] North Dakota's implied consent law as challenged, either on its face or as applied, does not violate the Fourth Amendment of the United States Constitution applying either general Fourth Amendment principles or under the doctrine of unconstitutional conditions." 859 N.W.2d at 414.

Beylund does not present any legal authority that would alter the North Dakota Court's analysis in *Beylund*, and in any event, Beylund's unconstitutional conditions argument lacks merit. Again, this Court in *McNeely* approvingly discussed state laws that "impose serious consequences when a motorist withdraws [the] consent" he impliedly gave to BAC testing, including making "an adverse inference" against the motorist "in a subsequent criminal prosecution." 133 S. Ct. at 1556 (citing *Neville*, 459 U.S. at 563-564). The *Birchfield* petitioner fails to explain why

that "serious consequence" is permissible yet the "serious consequence" North Dakota and 12 other States impose is not.

The unconstitutional conditions doctrine – which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013) – is therefore inapplicable. For the *Birchfield* petitioner to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he impliedly consented to it when he obtained his driver's license. He cannot do so here.

And even if the *Birchfield* petitioner could show he had a constitutional right to refuse the test, his argument would still fail. The government may impose a condition where, as here, it has a "vital interest in doing so." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 362-363 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980)). This Court has repeatedly recognized the States' interest in public safety in removing drunk drivers from their highways. *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing that the interest in public safety is substantially served by summary suspension of driver's license by those who refuse to be tested upon arrest); *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); *McNeely*, 133 S. Ct.

at 1565 ("[D]runk driving continues to exact a terrible toll on our society."). North Dakota's implied-consent and refusal statutes further its vital interest in removing drunken drivers from the road.

North Dakota's implied-consent and refusal statutes are also consistent with this Court's repeated recognition that there are often consequences for not participating in searches. In *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004), this Court held that a State does not violate the Fourth Amendment by criminally punishing individuals for passively or nonviolently refusing to provide their identities to the police during a valid *Terry* stop. *Id.* at 189 (noting that "[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity"). States may also compel an individual to stand in a lineup or wear particular clothing, or to produce incriminating non-testimonial evidence such as a blood sample, handwriting exemplar, or voice exemplar. *Doe v. United States*, 487 U.S. 201, 210 (1988). And in *Neville*, the Court permitted the State to use an individual's refusal to cooperate with such requests as evidence of the individual's guilt. *Neville*, 459 U.S. at 566.

North Dakota's statutory scheme fits well into this line of cases. Ultimately, "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for the suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Id.* at 564.

III. There is no pressing need for this Court to resolve the question presented.

The *Birchfield* petitioner's last ground for why this Court should grant certiorari is that state test-refusal statutes are applied with considerable frequency and may impact hundreds of thousands of convictions each year. *Birchfield*, Pet. 12. The frequency of a *constitutional* practice, however, is not cause for concern. And so Birchfield's "importance" argument amounts to a repeat of his error-correction argument, namely, that the various appellate courts to have addressed criminal-refusal statutes have all gotten it wrong. As shown above, however, they have not. That these statutes are applied frequently thus shows merely that they are operating as they were designed to operate. And the fact that some other States are considering legislation that would impose similar criminal penalties shows only that protecting citizens from drunk driving remains a large concern throughout the country, and that implied-consent and refusal laws are considered a fair and reasonable way to accomplish that objective.

CONCLUSION

The Petitioner does not present compelling reasons for this Court to grant the petition. Accordingly, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied in all respects.

Respectfully submitted this 24th day of September, 2015.

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In the Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR PETITIONER

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QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the motorist's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize refusal by a motorist to submit to such a test, even if a warrant has not been obtained. Here, petitioner submitted to a test after being informed that refusal is a criminal offense; North Dakota suspended petitioner's drivers' license when the test returned an alcohol concentration over 0.08. The question presented is:

Whether consent to a search is valid for Fourth Amendment purposes when the State obtains consent by informing the person who is subject to the search that failure to submit will result in criminal prosecution.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (*Beylund* Pet. App. 1a-22a) is reported at 859 N.W.2d 403. The decision of the North Dakota district court (Pet. App. 23a-37a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on February 12, 2015. *Beylund* Pet. App. 22a. That court denied petitioner's motion for rehearing on March 24, 2015. *Id.* at 44a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *

North Dakota law, N.D. Cent. Code § 39-08-01, provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply: * * *
>
> e. That individual refuses to submit to any of the following:

(1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or

(3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

* * *

2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

North Dakota law, N.D. Code § 39-20-04.1(1), provides in relevant part:

> After the receipt of the certified report of a law enforcement officer and * * * if that hearing is requested and the findings, conclusion, and decision from the hearing confirm that the law enforcement officer had reasonable grounds to arrest the person and test results show that the arrested person was driving or in physical control of a vehicle while having an alcohol concentration of at least eight one-hundredths of one percent by weight * * * at the time of the performance of a test within two hours after driving or being in physical control of a motor vehicle, the director shall suspend the person's driving privileges as follows:
>
> * * *
>
> d. For two years if the person's driving record shows that within the seven years preceding the date of the arrest, the person's operator's license has once been suspended, revoked, or issuance denied under this chapter, or for a violation of section 39-08-01 or equivalent ordinance, with the last violation or suspension for an alcohol concentration of at least eighteen one-hundredths of one percent by weight or if the person's driving record shows that within the seven years preceding the date of arrest, the person's operator's license has at least twice previously been suspended, revoked, or issuance denied under this chapter, or for a violation of section 39-08-01 or equivalent ordinance, or any combination thereof, and the suspensions, revocations, or denials resulted from at least two separate

> arrests with the last violation or suspension for an alcohol concentration of under eighteen one-hundredths of one percent by weight.

STATEMENT

Like its companion cases, *Birchfield* v. *North Dakota*, No. 14-1468 (cert. granted Dec. 11, 2015), and *Bernard* v. *Minnesota*, No. 14-1470 (cert. granted Dec. 11, 2015), this case presents the question whether a State may penalize a motorist's refusal to consent to a warrantless chemical test of the motorist's blood, breath, or urine to detect the presence of alcohol. The court below upheld the constitutionality of North Dakota's compelled-consent law, relying on its holding in *Birchfield* that the State may deem all drivers on its roads to have consented to a warrantless chemical test if they are arrested on suspicion of driving while intoxicated. The Minnesota Supreme Court gave the same answer, but rested it on a different rationale, in *Bernard*.

This case involves a civil sanction—the suspension of petitioner's driver's license—rather than a criminal penalty. It also involves an arrestee who *submitted* to a warrantless chemical test upon being told that refusal to submit would lead to the imposition of criminal penalties, rather than an arrestee (as in *Birchfield* and *Bernard*) who refused to submit to the test. Despite these differences from *Bernard* and *Birchfield*, the proper outcome here is affected by the answer that is central to those cases: whether a State may make it a crime for a person to assert the Fourth Amendment right to resist a search in the absence of a warrant or an exception to the warrant requirement.

To avoid duplication, we address issues that are common to the cases in petitioner's brief in *Birchfield*. In this brief, we focus on questions that are unique to this case—and show, in particular, that consent to a search is not voluntary, and therefore is not constitutionally effective, when the consent is obtained by informing the person to be searched that refusal to consent will be punished by the imposition of criminal penalties. The North Dakota Supreme Court's contrary holding should be set aside.

1. North Dakota, like twelve other States, has criminalized the refusal of a motorist who has been arrested for driving under the influence to submit to a warrantless chemical test designed to detect the presence of alcohol in the driver's blood. See N.D. Cent. Code § 39-08-01(1). A first refusal to consent to a chemical test qualifies as a misdemeanor, while subsequent offenses trigger escalating penalties; a "fourth or subsequent offense within a fifteen-year period" qualifies as a felony. *Id.* § 39-08-01(3). If the arrestee submits to a chemical test and the test reveals a blood-alcohol concentration above a certain threshold, the arrestee is subject to the administrative sanction of driver's-license suspension; the suspension lasts from ninety-one days to three years, depending on whether the arrestee has "previously violated section 39-08-01 or equivalent ordinance." *Id.* § 39-20-04.1(1).

2. On August 10, 2013, a police officer stopped petitioner on suspicion of driving while intoxicated. *Beylund* Pet. App. 2a-3a. After being transported to a hospital, petitioner agreed to a blood test after receiving an advisory informing him that, under section 39-20-01(3)(a), "North Dakota law require[d] [him] to take the test" and "refusal * * * [was] a crime punishable in the same manner as driving under the influence * * * "

Beylund Pet. App. 3a. Petitioner subsequently contended that, because he agreed to be tested upon threat of criminal penalties, the test was compelled in violation of his Fourth Amendment rights. *Id.* at 7a.

3. At an administrative hearing, a hearing officer from the North Dakota Department of Transportation found that the arresting police officer had "reasonable grounds to believe" that petitioner had been driving a vehicle "while under the influence of intoxicating liquor," in violation of N.D. Cent. Code § 39-08-01, and that the officer lawfully arrested petitioner and lawfully administered a warrantless blood test, in accordance with N.D. Cent. Code §§ 39-20-01 & -02. *Beylund* Pet. App. 3a, 41a. Because the test results showed "an alcohol concentration of at least eighteen one-hundredths of one percent by weight," the hearing officer suspended petitioner's driving privileges for two years. *Id.* at 3a, 41a.

Petitioner appealed his license suspension to the North Dakota district court, which affirmed the suspension. *Beylund* Pet. App. 23a-39a. That court found that "no bright line rule" applied and that the reading to petitioner of the compelled-consent advisory "in and of itself does not indicate automatic coercion regarding consent to a chemical test." *Id.* at 35. Therefore, the court proceeded to "[a]ssess[] the totality of the circumstances" and pronounced itself "not persuaded that [petitioner] was coerced into consenting to the chemical tests of his breath and blood." *Id.* at 36a.

4. The North Dakota Supreme Court also affirmed. *Beylund* Pet. App. 1a-22a.

Addressing petitioner's argument that his consent to the blood test had been "involuntary because he was coerced by the statut[ory] penalties, which criminalize

refusal," the court cited its decision in *Birchfield* for the proposition that North Dakota's criminal penalties for refusing a warrantless chemical test are not unconstitutionally coercive. *Beylund* Pet. App. 7a-8a. The court therefore found that petitioner "voluntarily consented to the blood test." *Id.* at 8a.

The court next considered petitioner's argument that "North Dakota's implied consent law violates the unconstitutional conditions doctrine because it conditions the privilege of driving on the relinquishment of the constitutional right to be free of unreasonable searches and seizures." *Beylund* Pet. App. 9a. "As a preliminary matter," the court expressed doubt whether the unconstitutional-conditions doctrine "applies to a constitutional challenge based on the Fourth Amendment." *Id.* at 13a. The court also observed that "consent is an exception to the [Fourth Amendment's] warrant requirement" and that, "if [petitioner] had refused the test, no search would have occurred." *Id.* at 16a.

Even if petitioner had a "constitutional right to refuse" a warrantless test, the court continued, it could still uphold the statute if it determined that "the State's interest in regulating intoxicated drivers is related to the privilege of driving in such a way that the implied-consent statutes are reasonable." *Beylund* Pet. App. 17a-19a. And the court did, in fact, find the law reasonable: it held that "North Dakota's implied consent laws * * * 'confer[] on drivers the privilege of *soberly* operating inherently dangerous motorized vehicles on the state's roadways * * * and, in exchange, each driver accepts a statutory choice.'" *Id.* at 19a (quoting *State* v. *Chasingbear*, No. A14-0301, 2014 WL 3802616, at *7 (Minn. Ct. App. 2014)). Because, "[a]s noted in *Birchfield*, a licensed driver has a diminished

expectation of privacy with respect to the enforcement of drunk-driving laws," the court concluded that petitioner's unconstitutional-conditions argument could not succeed. *Id.* at 19a-20a.

SUMMARY OF ARGUMENT

The North Dakota Supreme Court held that petitioner consented to the search in this case. For that decision to be correct, the State must show that the consent was "the product of an essentially free and unconstrained choice" and "not the result of duress or coercion."

Such a showing could not possibly be made in this case. To the contrary, the officer who arrested petitioner induced him to submit to the search by informing him that refusal to consent was a crime that was punishable in the same manner as driving under the influence. Consent offered on these terms cannot be regarded as voluntary; as this and other courts have held, action produced by the threat of punitive government sanctions necessarily is coerced. The point is not fairly debatable: North Dakota's law is *intended* to compel consent, and in this case that is just what it did. Consent to search obtained in such circumstances is not constitutionally effective, and the evidence gathered in the resulting search was obtained in violation of the Fourth Amendment.

Because the court below erred in holding that petitioner consented to the search that produced the evidence used to suspend his license, this Court should reverse that decision and remand the case for consideration of the proper remedy as a matter of state law.

ARGUMENT

As we show in petitioners' briefs in *Birchfield* and *Bernard*, a State must obtain a warrant to compel a motorist to submit to a blood test in the circumstances of this case. That being so, as we also show in those briefs, it is fundamental that a State may not impose criminal punishment on a motorist for the constitutionally protected act of refusing to submit to an unwarranted—and therefore unconstitutional—blood test. *Birchfield* Br. 31-33. Yet in this case, the North Dakota Supreme Court held that constitutionally effective consent to a search was provided by a motorist who granted that consent only because he was informed that failure to consent would lead to the imposition of criminal penalties for test refusal.

It is rare that a holding of a state supreme court can fairly be described as utterly indefensible, but this is such a case. "Consent" that is provided in response to the threat of criminal punishment is the very definition of consent that is coerced, involuntary, and *in*effective to excuse the State's failure to obtain a warrant. Because, as we show in petitioner's brief in *Birchfield* (at 25-30), the State's alternative theory of "deemed consent" also is flawed, the decision below should be reversed.

A. The search of petitioner's blood was not consensual.

1. As we show in more detail in petitioner's brief in *Birchfield* (at 12-13), "the most basic constitutional rule in [the Fourth Amendment context] is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable[,] * * * subject only to a few specifically established and well delineated exceptions." *Coolidge*

v. *New Hampshire*, 403 U.S. 443, 454-455 (1971). One "'jealously and carefully drawn' exception recognizes the validity of searches [undertaken] with the voluntary consent of an individual possessing authority" to give it. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (citations omitted).

A valid consent to search is given when the totality of the circumstances indicate that the acquiescence was "the product of an essentially free and unconstrained choice." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973). Thus, when "the State attempts to justify a search [of a person] on the basis of [the person's] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248. "The burden is on [the State] seeking the exemption to show the need for it. *Coolidge*, 403 U.S. at 455.

2. The State has not come close to meeting its burden of showing that petitioner's consent to the search of his blood in this case was consensual.

After petitioner was taken in police custody to a hospital, "the [arresting] police officer read the implied consent advisory to [him]." *Beylund* Pet. App. 3a. That advisory directed the officer to inform petitioner that "North Dakota law requires the individual [charged] to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal * * * to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of [his] driving privileges." N.D. Code. § 39-20-01(3)(a).

That is a patently coercive advisory. Self-evidently, a suspect's agreement to a chemical search of his blood is not "free and unconstrained" (*Schneckloth*, 412 U.S. at 225) when he is told that the only alternative is criminal prosecution and possible imprisonment. Thus, this Court has said that when a "witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt," the resulting statements are "the essence of coerced testimony." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). And other courts, following that lead, have not hesitated to hold—in circumstances far more ambiguous than those at issue here—that when a statement by a police officer "indicates that there are punitive ramifications to the exercise of the constitutional right to refuse consent," those actions are coercive. *Eidson* v. *Owens*, 515 F.3d 1139, 1147 (10th Cir. 2008) (citing *United States* v. *Sebetich*, 776 F.2d 412, 425 n.21 (3d Cir. 1985); *United States* v. *Haynes*, 301 F.3d 669, 687 (6th Cir. 2002) (Boggs, J., concurring in part).

Ignoring these precedents and common sense alike, the court below held that petitioner "voluntarily consented to the blood test." *Beylund* Pet. App. 8a. Without meaningful explanation, it took the position that "a [chemical blood] test is not coerced simply because" the suspect is told that "refusal to take [the] test [is] a crime." *Ibid.* And "[b]ecause [petitioner] allege[s] no other coercive circumstances, other than the penalties" under the criminal consent statute, the court "conclude[d] he voluntarily consented to the blood test." *Ibid.*

That assertion, however, may fairly be described as bewildering. *Of course* the threat of criminal sanctions is coercive; fundamentally, "[d]uress consists in actual or threatened violence or imprisonment." *Black's Law Dictionary* (10th ed. 2014). Indeed, it is a basic princi-

pal of ordered society that laws, and the criminal sanctions that apply when they are broken, are *meant* to compel citizens to do some required acts (like paying taxes) and to refrain from doing other forbidden acts (like stealing property). Plainly enough, "the coercion of the law is by criminal punishment." *District of Columbia* v. *Brooke*, 214 U.S. 138, 151 (1909). That observation is beyond cavil. See, *e.g.*, *Madeira* v. *Affordable Hous. Found.*, 469 F.3d 219, 239 (2d Cir. 2006) (observing that the law's threat of "punishment for a criminal act" is a "coercive measure"); *Albright* v. *Oliver*, 975 F.2d 343, 347 (7th Cir. 1992) (the threat of "criminal punishment" is a "form of public coercion") aff'd, 510 U.S. 266 (1994).

It is no answer to say, as did the court below (*Beylund* Pet. App. 16a) that "[l]aw enforcement is not authorized to force a test" under the criminal consent statute, and that petitioner could have "refused the test." The question here is whether the threatened *consequences* of refusal were coercive. As we have shown—and as simple common sense suggests—they were. And "[w]here there is coercion, there cannot be consent." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968).

3. Having said that, it is possible that the analysis might be different if the State actually had the constitutional authority to punish motorists for the crime of test refusal, even in the absence of a warrant or an exception to the warrant requirement. It is a truism that an act is not coerced simply because a person is put to a "difficult choice[]" (*South Dakota* v. *Neville*, 459 U.S. 553, 564 (1983)), and perhaps such a choice would be presented were the consequences of test refusal *accurately* described to a motorist. But the choice whether to permit a search is not only hard but

unconstitutionally coerced when consent to the search is the product of a threatened prosecution that would itself violate the Constitution.

B. The unconstitutional nature of the search requires remand.

The court below, having found that petitioner consented to the test of his blood, had no occasion to address the proper remedy if petitioner actually had been unconstitutionally coerced into submitting to the search that yielded the incriminating evidence used to suspend his license. Because that issue was not addressed below, and because state law is likely dispositive on the point, the question is best reserved for consideration in the first instance on remand. See, *e.g.*, *Missouri* v. *Frye*, 132 S. Ct. 1399, 1411 (2012); *Am. Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2540 (2011).

1. As a matter of state law, the answer to the remedial question appears clear: the North Dakota Department of Transportation may use chemical test results when "the sample was *properly obtained*." N.D. Cent. Code § 39-20-07(5) (emphasis added).[1] This provision governs the circumstances in which chemical test results may be introduced as evidence in license suspension proceedings. See *Filkowski* v. *Dir., N.D. Dep't of Transp.*, 862 N.W.2d 785, 790 (N.D. 2015).

When a blood sample is obtained by means of an unconstitutionally coerced "consent" the sample was not "properly obtained," as that phrase is understood in North Dakota. Rather, for a sample to be "properly ob-

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[1] In *Bernard*, the Minnesota trial court understood Minnesota's compelled-consent statute similarly to impose criminal penalties only for refusal of a *lawful* demand to be tested. *Bernard* Pet. App. 54a-55a.

tained," its collection must comply with governing constitutional principles. That is, "the test" must have been "the result of a valid arrest or other precondition for its administration" in order to be "properly obtained." *State* v. *Jordheim*, 508 N.W.2d 878, 882 (N.D. 1993). See also *State* v. *Friedt*, 735 N.W.2d 848, 854 (N.D. 2007) (crux of argument was that improperly obtained evidence was inadmissible). Thus, as a matter of North Dakota law, the Department of Transportation may not rely on blood tests performed on a sample taken in violation of an individual's constitutional rights.

2. In addition, federal constitutional law suggests the same result. Similar to asset forfeiture, a license suspension "is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution" itself. *One 1958 Plymouth Sedan* v. *Com. of Pa.*, 380 U.S. 693, 701 (1965). Indeed, as we have shown in the *Birchfield* petitioner's brief (at 23), because the ability to drive is fundamental to the economic, social, and familial well-being of a vast number of Americans, suspension of an individual's driver's license for a period of years can be an extremely burdensome penalty. In these circumstances, the prospect that illegally obtained evidence would be excluded from use in license-suspension proceedings could be expected to have a significant deterrent effect on unconstitutional law enforcement conduct. Compare *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 367 (1998) ("application of the exclusionary rule to parole revocation proceedings would have little deterrent effect upon an officer who is unaware that the subject of his search is a parolee"); *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976) ("deterrence" value of excluding wrongfully-obtained evidence from civil tax proceedings is "marginal").

For present purposes, however, the dispositive point is that the North Dakota Supreme Court erred in holding that petitioner's consent to be tested was voluntary. Because that consent was coerced and therefore was constitutionally ineffective, the decision below should be reversed and the case remanded for further proceedings.

CONCLUSION

The judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted.

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No. 14-1507

IN THE

Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF RESPONDENT

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QUESTION PRESENTED

North Dakota law makes it an offense for a motorist arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol.

The question presented is:

Whether a motorist can voluntarily consent to a chemical test after an officer reads an implied consent advisory informing him that he could be charged with a crime if he refuses to submit to such a test.

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INTRODUCTION

Although stemming from the same state law as its companion case, *Birchfield v. North Dakota*, No. 14-1468, this case differs from *Birchfield* because Petitioner Steve Michael Beylund consented to a blood test after being read the implied-consent advisory. He now objects to the State's use of the test results in subsequent civil enforcement proceedings. Beylund's claim necessarily fails if the Court agrees with North Dakota in *Birchfield* that a State may require consent to a chemical test, upon arrest for drunk driving, as a condition for driving within the State. So far as we can tell, Beylund does not dispute this. *See* Pet. Br. 4, 12. His entire brief is premised on Birchfield prevailing in his case.

If the State does not prevail in *Birchfield*, the issue becomes whether Beylund's consent to a blood test was still voluntary and therefore was constitutional. This Court has long held that the voluntariness of consent must be determined by assessing the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). To be sure, the implied-consent advisory—informing Beylund that refusal to take a chemical test is a crime—is a factor in that analysis. In many cases, it will be dispositive. But it will not *always* be dispositive. For example, some individuals will wish to prove their innocence by submitting to a chemical test. If this Court reverses in *Birchfield*, it should remand here to allow the North Dakota courts to assess the totality of the circumstances in the first instance.

STATEMENT

To avoid duplication, the State does not address in this brief issues common to *Birchfield* and *Bernard v. Minnesota*, No. 14-1470. This brief addresses only matters directly connected to the North Dakota Supreme Court's affirmance of the hearing officer's finding that Beylund voluntarily consented to the blood test.

1. North Dakota conditions the privilege of driving on its roads on the driver's consenting to submit to a chemical test of his blood, breath, or urine to detect the presence of alcohol or drugs. N.D. Cent. Code § 39-20-01(1). Under North Dakota's implied-consent law, a law enforcement officer may request a chemical test only if the driver has been arrested on probable cause for driving under the influence (DUI). *Id.* § 39-20-01(2). If, following his arrest, the driver withdraws his implied consent, he will not be subject to a "warrantless nonconsensual" chemical test. *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013); *see also* N.D. Cent. Code § 39-20-04(1); Brief of Respondent at 54 n.12, *Birchfield v. North Dakota*, 14-1468 (Mar. 15, 2016). But there are penalties for withdrawing consent when properly requested by a law enforcement officer, including prosecution for a criminal offense that, in almost all cases, is a misdemeanor. N.D. Cent. Code §§ 39-08-01(1)(e), 39-08-01(3).

At the time the officer requests a test of the DUI suspect, the officer is required to read the implied-consent advisory. N.D. Cent. Code § 39-20-01(3). The advisory informs the driver that "North Dakota law requires [him] to take the test to determine whether [he] is under the influence of alcohol or drugs; that refusal to take the test ... is a crime punishable in the same manner as

driving under the influence; and that refusal ... to submit to the test ... may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges." *Id.* The driver also has a limited right to consult with an attorney before deciding whether to submit to testing. *City of Mandan v. Leno*, 618 N.W.2d 161, 163 (N.D. 2000) (citing *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285, 290 (N.D. 1987)).

When a person arrested for DUI refuses to submit to chemical testing, the law enforcement officer takes possession of his license and issues the driver a temporary operator's permit, which "serves as the [Director of the Department of Transportation's] official notification ... of the director's intent to revoke driving privileges." N.D. Cent. Code § 39-20-04(1). The driver may request administrative review, *id.* § 39-20-05(1); any revocation of driving privileges does not then occur unless and until the hearing officer rules against the motorist. *Id.* § 39-20-04.1(1).

2. On August 10, 2013, at around 9:00 p.m., Bowman Police Officer Shawn Brien responded to a report of a suspicious vehicle in an individual's yard. Pet. App. 2a, 27a, 40a; Tr. of Testimony of Admin. Hrg. at 6, *In the Matter of the Suspension of the Driving Privileges of Steve Michael Beylund*, No. 06-2013-CV-00095 (Sept. 18, 2013) ("Tr."). Near the home, Officer Brien spotted a car matching the reported description and saw it nearly hit a stop sign while turning into a driveway. The car then stopped, partially in the roadway. Pet. App. 27a; Tr. 7.

Officer Brien pulled up behind the car, walked up to the driver's side, and observed an empty wine glass in the

center console and the odor of alcohol coming from inside the vehicle. Pet. App. 40a; Tr. 8. Beylund "stumbled" when exiting the car, and "grabbed the door for support." Pet. App. 40a; Tr. 9. After he could not complete a field sobriety test because he could not follow instructions to keep his head still, Officer Brien gave Beylund the implied-consent advisory and asked him to agree to an on-site screening breath test. Pet. App. 41a; Tr. 13. Beylund agreed to take the on-site breath test, but he failed to give a proper air sample after three attempts. Pet. App. 41a; Tr. 14.

At this point, Officer Brien arrested Beylund for DUI, and drove him to a local hospital. Pet. App. 41a; Tr. 14-15. At the hospital, Officer Brien again read Beylund the implied-consent advisory, including the provision that he would be charged with a crime if he refused. Pet. App. 41a; Tr. 16. Beylund agreed to submit to a chemical test, which established that he had a blood alcohol concentration of 0.25% by weight. Pet. App. 41a.

3. Beylund requested an administrative hearing under N.D. Cent. Code § 39-20-05, to contest the State's intent to revoke his driving privileges. The hearing officer found that Officer Brien had reasonable grounds to believe Beylund had been driving a vehicle under the influence of intoxicating liquor, that Officer Brien lawfully arrested Beylund, that the blood test was administered in accordance with state law, and that the test results showed Beylund had an alcohol concentration of at least eighteen one-hundredths of one percent by weight. Pet. App. 41a; Tr. 43. Based on her findings, the hearing officer suspended Beylund's driving privileges for two years. Pet. App. 41a; Tr. 43. Beylund did not testify at the hearing.

4. Beylund appealed his license suspension to the state district court, which affirmed the hearing officer's decision. The district court observed that this Court, in *McNeely*, "recognized the continued vitality of implied consent laws." Pet. App. 29a. It then rejected Beylund's contention that his consent was coerced, holding that "[t]he reading of an implied consent/refusal statute in and of itself does not indicate automatic coercion regarding consent to a chemical test." Pet. App. 35a. Assessing the totality of the circumstances, the district court found that Beylund had voluntarily consented to the blood test. Pet. App. 36a.

5. The North Dakota Supreme Court affirmed. Pet. App. 1a-20a. The court relied on its decision in *McCoy v. N.D. Department of Transportation*, 848 N.W.2d 659 (N.D. 2014), which—operating from the premise that the State's implied consent law does not impose an unconstitutional condition—held that "'a driver's decision to agree to take a test is not coerced simply because an administrative penalty has been attached to refusing the test.'" Pet. App. 8a (quoting *McCoy*, 848 N.W.2d at 667). The court then pointed to its decision in *State v. Smith*, 849 N.W.2d 599 (N.D. 2014), which held that the same is true even after the legislature increased the penalty for refusing to take the test to a misdemeanor. Pet. App. 8a. On the strength of those precedents, the Court held that Beylund had "voluntarily consented to the blood test." *Id.*

The remainder of the North Dakota Supreme Court's decision addressed and rejected Beylund's contention that "North Dakota's implied consent law violates the unconstitutional conditions doctrine because it conditions the privilege of driving on the relinquishment of the

constitutional right to be free of unreasonable search and seizures." Pet. App. 9a; *see id.* at 9a-20a. The State addresses that issue in its brief in *Birchfield* and will not otherwise address it here, except as relevant to the voluntariness issue.

SUMMARY OF ARGUMENT

As Beylund effectively concedes, a ruling for the State in *Birchfield* would defeat his challenge to the State's implied consent statute. Pet. Br. 4, 13. Simply put, if a State may make it a misdemeanor for a drunk-driving arrestee to refuse a chemical test, it can surely inform the arrestee of that consequence.

On the other hand, if the Court were to rule against the State in *Birchfield*, then the Court should remand this case to allow the North Dakota courts to determine in the first instance whether—on the totality of the circumstances—Beylund's consent was voluntary. Indeed, Beylund agrees that a remand would be warranted. Pet. Br. 13-15.

ARGUMENT

I. If this Court rules for the State in *Birchfield*, Beylund's contention that his consent to submit to a blood test was coerced must fail.

Beylund does not dispute that his claim fails if this Court rules for the State in *Birchfield* and holds that a State may impose criminal penalties on a motorist who, after being arrested for driving under the influence, refuses to submit to a chemical test. *See* Pet. Br. 12 (acknowledging

that "[i]t is a truism that an act is not coerced simply because a person is put to a 'difficult choice[],' and perhaps such a choice would be presented were the consequences of test refusal *accurately* described to a motorist") (quoting *South Dakota v. Neville*, 459 U.S. 553, 564 (1983)). The only affirmative argument he makes, Pet. Br. 9-13, is premised on the petitioner prevailing in *Birchfield*. This is for good reason.

If a State may make it a misdemeanor for a drunken driver to refuse a chemical test upon arrest, it can surely inform the driver of that consequence. As the Oregon Supreme Court explained, "accurately advising a defendant of a lawful penalty that could be imposed may well play a role in a defendant's decision to engage in a particular behavior, but that does not mean that the defendant's decision was 'involuntary.'" *State v. Moore*, 318 P.3d 1133, 1138 (Or. 2013); *see also McCoy*, 848 N.W.2d at 666 (relying on *Moore*). Any other result would mean that a State can condition the privilege of using its roads on the driver's consenting to submit to a chemical test, yet cannot use the results of that test when the driver submits to it—a nonsensical proposition.

Accordingly, the Court should affirm here for the same reasons it should affirm in *Birchfield*, as set forth in the State's brief in that case.

II. If this Court rules for the defendant in *Birchfield*, it should remand this case to allow the North Dakota state courts to assess whether, under the totality of the circumstances, Beylund's consent was voluntary.

In its decisions in this case, and in *McCoy* and *Smith*, the North Dakota Supreme Court rejected challenges to the State's implied-consent law or assumed that law's validity. *See* Pet. App. 9a-20a; *Smith*, 849 N.W.2d at 603-06; *McCoy*, 848 N.W.2d at 669 (declining to address whether the State's implied-consent law imposes an unconstitutional condition because the parties did not adequately brief the issue). The North Dakota Supreme Court has therefore not addressed whether and when a person arrested for drunk driving can voluntarily consent to a chemical test after being read an implied-consent advisory that is later found to have inaccurately informed him that he may be subject to criminal penalties for revoking consent. As explained below, the answer is that the totality-of-the-circumstances test applies and may show that consent was voluntary, even where the officer read to an arrestee an advisory later found by this Court to have included an unconstitutional condition.

1. The starting point is that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). And this Court has long recognized that searches undertaken with valid consent are reasonable and, thus, "constitutionally permissible." *Schneckloth*, 412 U.S. at 222 (collecting cases).

Consent is valid if it is "freely and voluntarily given." *Id.* (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). In *Schneckloth*, and in every other case cited by Beylund, this Court emphasized that the validity of consent is determined by examining the "totality of the circumstances." *Id.* at 226-27; *see also United States v. Drayton*, 536 U.S. 194, 206-07 (2002) (rejecting claim that individuals must be told affirmatively that they have a right to refuse a request to search; "[i]nstead, the Court has repeated that the totality of the circumstances must control"); *United States v. Watson*, 423 U.S. 411, 424 (1976) (assessing whether, "in the totality of the circumstances, [defendant]'s consent was not his own 'essentially free and unconstrained choice'" (citation omitted)). The ultimate question is whether, taking into account the totality of the circumstances, an individual's "will ha[d] been overborne and his capacity for self-determination critically impaired." *Schneckloth*, 412 U.S. at 225.

When assessing Fourth Amendment claims, the North Dakota Supreme Court has therefore applied the totality-of-the-circumstances test to determine the validity of suspects' consent. *See, e.g.*, *Smith*, 849 N.W.2d at 604-05; *McCoy*, 848 N.W.2d at 664-65.

2. The issue here is whether a driver's consent to a blood test can ever be voluntary when he is told that it is a crime to refuse to submit to the test, but (as we are assuming for purposes of this section of the brief) that criminal penalty is an unconstitutional condition. Beylund appears to argue that the answer is always no and that, as a categorical matter, consent is coerced if the implied-consent advisory is read before consent being given. *See* Pet. Br. 11. Categorical rules, however, are inconsistent

with the totality-of-the-circumstances test. *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (rejecting proposed *per se* rule regarding consents to search and stating that, "[i]n applying [the totality-of-the-circumstances] test, we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry"). As the Court recently stated, when a totality-of-the-circumstances inquiry applies, "[w]e have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (assessing whether State established probable cause to support a search warrant).

The situation presented here is no exception. An officer's telling a driver that refusal to take a chemical test is a crime is an important circumstance, one that (if the State may not make refusal a crime) will often mean that consent was coerced under the totality test. But there are many scenarios where a driver's consent to chemical testing may be voluntary even though an officer informed him that refusal to take a test is a crime punishable in the same manner as DUI. For example, a driver may consent to chemical testing because he believes the test results will prove his innocence. A driver might also consent because he does not want his license suspended as a result of a civil proceeding (as occurred here), irrespective of any possible criminal charge. Numerous drivers arrested for DUI consented to chemical testing before enactment of N.D. Cent. Code § 39-08-01(3), which now makes refusal to consent a misdemeanor in nearly all instances. *See e.g.*, *City of Bismarck v. Hoffner*, 379 N.W.2d 797, 800 (N.D. 1985) ("[D]espite Hoffner's testimony that it was the threat of losing his license for a year that caused him to

submit to the blood test, Hoffner consented to the taking of the blood voluntarily."); *Wolf v. N.D. Dep't of Transp.*, 523 N.W.2d 545, 546 (N.D. 1994) (Wolf consented to the test). Or a driver might have indicated his willingness to take a chemical test before the officer began reading the implied-consent advisory.

In the end, it is for state trial courts and administrative tribunals to assess all the circumstances and determine whether, in fact, the implied-consent advisory was the sole or predominant reason the driver consented. And it is for state appellate courts to review those totality-of-the-circumstances determinations.

3. In ruling that Beylund's consent was voluntary, the North Dakota courts rejected constitutional challenges to the State's implied-consent law or operated on the premise that the law was constitutional. *See* Pet. App. 9a-20a (North Dakota Supreme Court); Pet. App. 31a-36a (North Dakota District Court). None of those tribunals assessed whether Beylund's consent was voluntary if the State may *not* make revocation of consent to take the test a crime. For multiple reasons, they should be given the first opportunity to do so should this Court rule against the State in *Birchfield*.

First, this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Its usual practice when it rejects a lower court's legal rule, therefore, is to remand the case to allow the lower court to apply the correct legal rule to the facts. *See, e.g.*, *Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 662 (2016) (remanding to allow lower courts to apply correct interpretation of ERISA to the funds at issue).

Second, should this Court change the legal backdrop of Beylund's waiver and invalidate this aspect of North Dakota's implied-consent law, the parties may wish to introduce additional evidence that would bear on voluntariness. Where, as here, an administrative agency makes the initial factual determination, N.D. Cent. Code Ann. § 39-20-05; Pet. App. 40a-42a, North Dakota's Administrative Agencies Practices Act allows a court to remand the matter back to the agency hearing officer for the consideration of additional evidence. *See* N.D. Cent. Code § 28-32-45. A decision by this Court holding that Beylund's consent was or was not voluntary would preclude that procedural option.

As things stand, the evidence surrounding Beylund's consent is skimpy—mainly due to his refusal to testify or otherwise present evidence at the administrative hearing he requested. We know from Officer Brien's testimony that Beylund verbalized his consent to provide a blood sample, Tr. 16, and that he cooperated in the testing process, Tr. 17. Beylund did not state that he felt coerced to take the test or that the advisory motivated him to agree to the test against his better judgment. He instead argued solely that, as a matter of law, his consent was coerced because Officer Brien read the advisory to him. Pet. App. 7a ("[Beylund] claims his consent to take the test was involuntary because he was coerced by the statute's penalties, which criminalize refusal. Beylund does not allege any coercive circumstances, other than the penalties."); Pet. App. 28a ("Petitioner's ... final argument is that he was coerced into consenting to the chemical tests because refusal of the tests is a crime in North Dakota.").

But whether or not an individual's consent to a search was coerced is a matter of *fact*, not of law. By presenting no facts regarding the impact the implied-consent advisory actually had on him, *see* Pet. App. 36a ("Beylund has failed to allege any other factors that might suggest his consent was coerced, aside from reading of the Implied Consent/Refusal law itself."), he gave the hearing officer and state courts ample basis to conclude that his consent was voluntary. Perhaps the North Dakota tribunals would reach a different conclusion based on the (assumed) changed legal landscape; perhaps not. They are entitled to the first crack at it, and the opportunity to decide whether to allow the parties to introduce additional evidence.

Third, as Beylund acknowledges, even if a court ultimately concludes that his consent was involuntary, the proper remedy is an open question as a matter of both state and federal law. Pet. Br. 13-15. Indeed, he agrees that the question of remedy, at least, "is best reserved for consideration in the first instance on remand." Pet. Br. 13. Quite so, *if* there is a constitutional violation to remedy—an issue also "best reserved for consideration in the first instance on remand."

Beylund nonetheless goes on to argue that both North Dakota and federal constitutional law support the remedy of exclusion here. That is doubtful. As a state law matter, the North Dakota Supreme Court has refused to extend the exclusionary rule to include chemical test results in civil administrative proceedings. *See Fasching v. Backes*, 452 N.W.2d 324, 325 (N.D. 1990) ("[T]his court [has] recognized that constitutional protections afforded in criminal proceedings are not applicable in administrative license-suspension proceedings."); *Holte v. N.D. State*

Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989) ("The benefit of using reliable information of intoxication in license revocation proceedings, even when that evidence is inadmissible in criminal proceedings, outweighs the possible benefit of applying the exclusionary rule to deter unlawful conduct. Consequently, the exclusionary rule formulated under the fourth and fourteenth amendments was inapplicable in this license revocation proceeding.") (quotation omitted)).

As a federal constitutional matter, this Court has been extremely reluctant to order the remedy of exclusion in civil contexts. *See Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) ("[W]e have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials."). For example, the Court has held that the exclusionary rule does not apply to parole revocation proceedings, to grand jury proceedings, in civil tax proceedings, and in civil deportation proceedings. *Id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974)). Given those precedents, it seems unlikely that this Court will one day command the States to exclude unlawfully obtained evidence from civil proceedings devoted to whether a person's driver's license should temporarily be suspended. In any event, as all parties agree, now is not the time to decide that issue.

CONCLUSION

The judgment of the North Dakota Supreme Court should be affirmed.

Respectfully submitted,

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No. 14-1507

In the Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

North Dakota's brief demonstrates that there is not much that the Court must decide in this case. The State recognizes that, if the petitioner prevails in *Birchfield* and the Court holds there that the assertion of Fourth Amendment rights may not be criminalized, the State acted impermissibly in this case when it induced petitioner to consent to a search by threatening him with criminal prosecution for test refusal. And the parties agree that, in those circumstances, the Court should remand the case so that the state courts may, in the first instance, address remedial issues. See *Beylund* Opening Br. 13-15; N.D. Br. 8-13.

The only disputed question concerns the scope of the issues that would remain open on remand. North Dakota maintains that, notwithstanding the threat of prosecution issued to petitioner, his consent to be searched could have been voluntary, and that the state courts therefore should determine whether he actually consented to be searched for reasons *other* than the threat of prosecution. N.D. Br. 8-13. But for several reasons, it is beyond reasonable dispute that petitioner's consent was coerced and therefore *in*voluntary.

First, North Dakota asserts that the record regarding the circumstances under which petitioner agreed to be searched is "skimpy." N.D. Br. 12. What that actually means, as material reproduced by the State itself shows (*ibid.*), is that *both* courts below recited petitioner's consistent and undisputed explanation for why he consented to be tested: he was coerced by the State's criminal compelled-consent penalty. See Pet. App. 7a (petitioner "claims his consent to take the test was involuntary because he was coerced by the statute's penalties, which criminalize refusal" and

"does not allege any coercive circumstances, other than the penalties"); *id.* at 28a ("Petitioner's * * * final argument is that he was coerced into consenting to the chemical tests because refusal of the tests is a crime in North Dakota."). Aside from the entirely speculative (and highly improbable) alternative explanations conjured up by the State itself (see N.D. Br. 10), there is nothing to cast doubt on petitioner's statement.

Second, the State fails to recognize that *it* bore the burden of establishing voluntariness. "[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (quoting *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968)); see also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971); *Beylund* Opening Br. 10. North Dakota now asserts that, if the Court rules for petitioner in *Birchfield*, the law of compelled-conditions will have changed, and the State should get the opportunity to remake its case. N.D. Br. 11 12. But the law governing voluntariness and coercion will not have changed. The State could have responded to petitioner's coercion argument, and sought to satisfy its burden, by showing that petitioner had his own motives to submit to a search. Cf. N.D. Br. 10. Having failed to do so, the State should not get another bite at the apple.

The flaw in the State's approach is shown by its assertion that petitioner "gave the hearing officer and state courts ample basis to conclude that his consent was voluntary" because he "present[ed] no facts regarding the impact the implied-consent advisory actually had on him"—other, that is, than his being told that his failure to consent was a criminal offense.

Levi Br. 13. But this, of course, turns the burden on its head. Petitioner was not obligated to volunteer evidence that he *really* meant it when he stated that he was coerced by the threat of criminal prosecution; it was the State's obligation to demonstrate voluntariness.

Perhaps the State would have a stronger argument if it were able to show that a driver, simply by the act of driving, *knowingly* consented to a search in an express quid pro quo with the State. But we showed in the *Birchfield* opening brief (at 21-29) that such a theory of either actual or "deemed" consent is unavailable to North Dakota here, and neither the State nor the United States has challenged that proposition.

Third, the State maintains that categorical rules are inappropriate in resolving questions of voluntariness. N.D. Br. 9-10.[1] As a general matter, we agree. But there is at least one unvarying rule regarding voluntariness: acts produced by threat of criminal prosecution are "the essence of coer[cion]." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). Such coercion not only is an improper method of producing consent in itself, but also infects the entire interaction. Threats of criminal prosecution produce citizen-officer encounters "instinct with coercion," and "[w]here there is coercion, there cannot be consent." *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968).

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[1] Although the State also asserts that that whether consent is voluntary is a matter of fact, it seems most appropriate to approach voluntariness as a mixed question of law and fact. See Orin Kerr, *Voluntariness and the Law/Fact Distinction*, The Volokh Conspiracy (Dec. 5, 2013), perma.cc/U9TJ-MG2K ("Whether consent is voluntary is a conclusion based on a legal sense of what voluntariness means. It must have at least some legal elements in it.").

In these circumstances, if petitioner prevails in *Birchfield*, all that will remain to be done in this case on remand will be determination of the proper remedy for the involuntary search conducted by the State.

CONCLUSION

The judgment of the North Dakota Supreme Court should be reversed.

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No. 14-1507

IN THE

Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

vs.

GRANT LEVI, Director,
North Dakota Department of Transporation,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether it is a reasonable exercise of a state's police power to statutorily imply a motorist's consent to chemical testing of his or her breath, blood, or urine upon lawful arrest for driving under the influence of intoxicants.

2. Whether the North Dakota Supreme Court properly held that the state's criminal penalty for refusing a test did not render the petitioner's consent involuntary.

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IN THE

Supreme Court of the United States

STEVE MICHAEL BEYLUND,

Petitioner,

vs.

GRANT LEVI, Director,
North Dakota Department of Transporation,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the present case, Petitioner seeks reinstatement of his license to drive a car despite conclusive evidence of unquestioned reliability that he did, in fact, drive while intoxicated far above the legal blood alcohol limit. Such a result, gravely endangering the lives of innocent people, is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 10, 2013, Petitioner Steve Michael Beylund was lawfully stopped and arrested for suspicion of driving under the influence of intoxicants. *Beylund* v. *Levi*, 859 N. W. 2d 403, 406 (N. D. 2015). Petitioner was generally uncooperative and refused all field sobriety tests requested by the arresting officer claiming he had a "bad leg." *Ibid.* Petitioner agreed, however, to take an onsite preliminary screening test, but he failed to provide an adequate breath sample. *Ibid.* Petitioner was then arrested, taken to the hospital and advised of North Dakota's implied consent law. *Ibid.* Petitioner agreed to take a chemical blood test, which resulted in a blood alcohol concentration ("BAC") of 0.250g/100ml. *Ibid.*

Petitioner's driver's license was suspended for two years at the conclusion of an administrative hearing before a Department of Transportation ("DOT") hearings officer. *Ibid.* Petitioner filed for reconsideration arguing that the blood test was an unconstitutional warrantless search and that North Dakota's implied consent law violates the unconstitutional conditions doctrine. *Ibid.* Reconsideration was granted, but relief was denied. *Id.*, at 407. Petitioner appealed the suspension of his driving privileges. *Ibid.* Both the North Dakota district court and the North Dakota

Supreme Court affirmed the hearing officer's decision. *Ibid.*

SUMMARY OF ARGUMENT

Reasonableness is the touchstone of Fourth Amendment jurisprudence. Implying a lawfully arrested motorist's consent to chemical testing as a matter of law is a reasonable legal tool utilized by all 50 states to obtain probative evidence of intoxication. The public's interest in protecting innocent people and keeping intoxicated motorists off of the roadways is significant in comparison to the privacy interests of an arrested motorist who made the *choice* to drink and drive. A motorist's state granted privilege of operating a motor vehicle must respect the fundamental rights of others to be free from bodily harm.

Criminalizing a lawfully arrested motorist's refusal to chemical testing does not unconstitutionally coerce his or her consent thus rendering it involuntary. North Dakota's use of criminal or threatened criminal penalties to deter criminal behavior is constitutionally permitted. The sate's compelling interest in obtaining blood alcohol concentration evidence of arrested, impaired motorists by criminalizing the choice to refuse is a reasonable means of enforcing its driving under the influence laws and does not unconstitutionally condition a motorist's driving privileges.

ARGUMENT

I. A motorist's statutorily implied consent to submit to a search of his or her breath, blood, or urine after lawful arrest for suspicion of driving while impaired falls within the consent exception to the Fourth Amendment's warrant requirement.

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, provides that "the people are 'to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, . and no Warrants shall issue, but upon probable cause. . ." *Maryland* v. *Pringle*, 540 U. S. 366, 369 (2003) (*quoting* U. S. Const., Amdt. 4) (emphasis added). The touchstone of Fourth Amendment jurisprudence is reasonableness. *United States* v. *Knights*, 534 U. S. 112, 118 (2001). Other general rules that have been judicially inferred from the Fourth Amendment, such as the preference for warrants and the probable cause standard for warrantless searches, are secondary to the primary reasonableness requirement. These secondary rules may yield in particular circumstances where the important interests make it reasonable to strike the balance in a different place. Thus in *Knights*, the special need to closely supervise probationers made it reasonable to lower the evidence standard to reasonable suspicion and to dispense with the warrant requirement. See *id.*, at 120-122. Although driving a car is a very common activity, it does involve operation of a machine of enormous, potentially destructive power. The toll of death, injury, and destruction that the people of this country suffer every year from someone driving while intoxicated cannot be ignored in favor of blind application of standard rules.

A. Probable Cause Requirement.

Any individual who operates a motor vehicle in North Dakota is deemed to have given consent to a chemical test to determine if alcohol or drugs are present in his or her body.[2] All 50 states have enacted similar implied consent laws. *Missouri* v. *McNeely*, 569 U. S. __, 133 S. Ct. 1552, 1566, 185 L. Ed. 2d 696, 712 (2013) (plurality opinion) (cited below as "*McNeely*"). For the consent law to "kick in," two layers of constitutional protection must first be established. First, the police officer must have reasonable suspicion to believe a motorist is driving under the influence of intoxicants to justify stopping the vehicle for further investigation. See *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968). Second, once reasonable suspicion exists for the stop, the police officer must have probable cause to believe the motorist is actually impaired to justify the motorist's arrest. *United States* v. *Watson*, 423 U. S. 411, 423-424 (1976).

Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). The police officer's critical assessment of the suspected drunk driver gives rise to probable cause to pursue a chemical test. In an impaired driving scenario, probable cause can be established by the officer's observation of many factors—bloodshot, watery eyes, the smell of alcohol on the driver, admission of

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2. "Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine." N. D. Cent. Code § 39-20-01(1).

drinking, actual alcohol containers in the vehicle, slurred speech, delayed motor abilities, failed field sobriety testing, etc.

Only after a police officer places the motorist under arrest and informs the individual that he or she is being charged with DUI is the officer required to advise the motorist that North Dakota law requires the individual to take a chemical test of his or her breath, blood, or urine to determine whether he or she is under the influence of alcohol or drugs.[3] The police officer must also inform the motorist of the penalty for refusing to take a chemical test.[4] If a police officer fails to inform the motorist of the implied consent law and the option to refuse, yet a motorist submits to testing, then the test results are not admissible in a future criminal or

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3. "The test or tests must be administered at the direction of a law enforcement officer only after placing the individual, except individuals mentioned in section 39-20-03, under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest. The law enforcement officer shall determine which of the tests is to be used." N. D. Cent. Code § 39-20-01(2).

4. "The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges." N. D. Cent. Code § 39-20-01(3)(a).

administrative hearing.[5] If the motorist refuses to be tested, no test will be given. However, refusal "is a crime punishable in the same manner as driving under the influence" and the motorist may have his or her driving privileges revoked "for a minimum of one hundred and eighty days and up to three years[.]" N. D. Cent. Code § 39-20-01(3)(a).

The revocation of a motorist's driving privileges is civil and all 50 states impose varying civil penalties on a driver's withdrawal of consent. See, *e.g.*, Me. Rev. Stat., Tit. 29-A, § 2521(6) (driver's license suspended for minimum of 275 days for first refusal, 18 months for second refusal, 4 years for third refusal, and 6 years for fourth refusal); W. Va. Code § 17c-5-7(a) (driver's license suspended for one year or 45 days plus an additional one-year ignition interlock device on the motorist's vehicle for first refusal).

In addition to civil penalties for withdrawal of consent, North Dakota and 14 other states also impose a criminal penalty, either as a separate offense or as an enhancement.[6] In 2013, the North Dakota legislature increased DUI penalties, making test refusal a crime in

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5. "A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a." N. D. Cent. Code § 39-20-01(3)(b).

6. See Alaska Stat. Ann. § 28.35.032; Cal. Veh. Code §§ 23612(D), 23577; Fla. Stat. Ann. § 316.1939; Haw. Rev. Stat. § 291E-68; Kan. Stat. Ann. § 8-1025; La. Rev. Stat. Ann. §§ 14:98.7, 32:666(A)(1)(c); Me. Rev. Stat., Tit. 29-A, § 2521(3)(c); Minn. Stat. Ann. § 169A.20(2), subd. 2; Neb. Rev. Stat. §§ 60-6,197, 60-6,211.02; 75 Pa. Cons. Stat. Ann. § 3804(c); R. I. Gen. Laws Ann. § 31-27-2.1; Tenn. Code Ann. § 55-10-406(c); Vt. Stat. Ann., Tit. 23, § 1201; Va. Code Ann. § 18.2-268.3.

an effort to "enact tougher laws in response to the carnage on our nation's highways." *State* v. *Smith*, 849 N. W. 2d 599, 602-603 (N. D. 2014); see also *South Dakota* v. *Neville*, 459 U. S. 553, 558 (1983). States have a "paramount interest . . . in preserving the safety of its public highways[.]" *Mackey* v. *Montrym*, 443 U. S. 1, 17 (1979). "A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings." *Id.*, at 19.

Prior to 2013, many courts interpreted *Schmerber* v. *California*, 384 U. S. 757 (1966), to hold that the natural dissipation of alcohol from the bloodstream alone was enough to constitute an exigency, thus excepting non-consensual warrantless blood draws from running afoul of the Fourth Amendment. See *McNeely*, 133 S. Ct., at 1558, n. 2, 185 L. Ed. 2d, at 703-704, n. 2 (describing split of authority). Following *Schmerber*, this Court held that a motorist's option to refuse a chemical test was simply a matter of legislative grace and not a constitutional right. *Neville*, 459 U. S., at 563-564. Therefore a motorist's refusal could be introduced into evidence in a subsequent proceeding without violating his or her Fifth Amendment rights. *Ibid.* Thus, law enforcement acted under the premise that an officer could secure a chemical test from an arrested motorist either via consent or force without a warrant. See, *e.g.*, *Burnett* v. *Anchorage*, 806 F 2d 1447, 1450 (CA9 1986).

The DUI enforcement landscape dramatically changed with *McNeely*. This Court held that the natural dissipation of alcohol in a motorist's blood stream alone does not create a *per se* exigency that would justify a non-consensual forced blood draw in every DUI case without a warrant. 133 S. Ct., at 1568, 185 L. Ed. 2d, at 715. Although the *McNeely* plurality

noted that some states have had a positive experience with routinely requiring warrants, see *id.*, 133 S. Ct., at 1566-1567, 185 L. Ed. 2d, at 713, it does not follow that one size fits all. Differences in resources and jurisdiction may render this solution impractical in some jurisdictions. See *id.*, at 133 S. Ct., at 1578, 185 L. Ed. 2d, at 725-726 (Thomas, J., dissenting).

The *McNeely* plurality also recognized the limitations of securing a warrant in many DUI situations and referred to all 50 states' use of implied consent laws and commensurate consequences for withdrawal of consent:

> "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [Citation.] Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, 133 S. Ct., at 1566, 185 L. Ed. 2d, at 712 (internal citation omitted).

When a motorist is pulled over for suspected drunk driving, the officer has no idea how much alcohol the individual consumed or the type of drugs in his or her system. At that point, an officer only has reasonable suspicion to believe the driver is impaired. After the stop, the officer, "a trained observer and investigator," *Mackey*, 443 U. S., at 14, determines if the preliminary evidence gives rise to probable cause to arrest the motorist for DUI. If the motorist is placed under

arrest, probative evidence of intoxication is necessary to successfully prosecute. The timing to determine the BAC of an arrestee in a DUI situation is critical. "[D]elays in obtaining warrants are unpredictable and potentially lengthy." *McNeely*, 133 S. Ct., at 1578, 185 L. Ed. 2d, at 725-726 (Thomas, J. dissenting).

It is reasonable for a state to want to encourage chemical testing of drivers lawfully arrested for DUI. It is reasonable for a state to want to prevent drunk drivers from killing or injuring innocent people. It is reasonable for a state to mandate consent as an alternative to a warrant as a condition of using its public roadways. It is unreasonable to permit a lawfully arrested drunk driver to go unpunished for a crime he or she committed due to willful lack of cooperation with law enforcement.

Implied consent as a matter of law is a reasonable legal tool utilized by all 50 states to obtain probative evidence of BAC levels of a lawfully arrested motorist. Because both a warrant and statutorily implied consent require probable cause prior to testing, implying the motorist's consent as a matter of law and attaching tough penalties for refusal is an effective first line of defense for states to enforce their DUI laws in an effort to keep habitually impaired drivers off of the roadways.

B. Informed Consent.

The Fourth Amendment protects against unreasonable searches and seizures. "[A] warrantless search of the person is reasonable only if it falls within a recognized exception." *McNeely*, 133 S. Ct., at 1558, 185 L. Ed. 2d, at 704. A chemical test given by a government agent to determine the presence of intoxicants in a motorist's breath, blood, or urine is a search for purposes of Fourth Amendment jurisprudence. *Ibid.* (blood); see also *Skinner* v. *Railway Labor Executives'*

Ass'n, 489 U. S. 602, 616-617 (1989) (breath and urine). One widely recognized exception to the warrant requirement is consent. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973); *Zap* v. *United States*, 328 U. S. 624, 630 (1946). Valid consent is to be evaluated under the totality of the circumstances and it must be voluntary and not the product of express or implied duress or coercion. *Schneckloth*, 412 U. S., at 227. Voluntariness is a question of fact to be determined from the circumstances. *Ohio* v. *Robinette*, 519 U. S. 33, 40 (1996).

It is well settled that knowledge of one's right to refuse consent to search need not be established for consent to be constitutionally effective. *Id.*, at 39-40; *United States* v. *Drayton*, 536 U. S. 194, 206-207 (2002); *Schneckloth*, 412 U. S., at 249. North Dakota's statutorily implied consent law, however, gives the motorist the statutory ability to refuse chemical testing and a motorist must be informed of this option even though it is not mandated by the Federal Constitution. N. D. Cent. Code § 39-20-01(3)(a); see also *Robinette*, 519 U. S., at 42 (Ginsburg, J., concurring). Law enforcement cannot force a chemical test and if a motorist refuses, no test will be given. N. D. Cent. Code § 39-20-04(1). This practice is consistent with this Court's holding in *McNeely*, which states that before a police officer can conduct a *non-consensual* chemical search of a motorist who is suspected of DUI, the officer must obtain a search warrant unless exigent circumstances prevented timely procurement of a warrant. 133 S. Ct., at 1563, 185 L. Ed. 2d, at 709. If relying on exigent circumstances, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case. *Id.*, 133 S. Ct., at 1568, 185 L. Ed. 2d, at 715. Instead, the exigency must be determined on a case by case basis to determine reasonableness. *Ibid.*

The two-part process under North Dakota law involves both an implied consent and an actual, informed consent. The law implies consent from the inherently dangerous activity of driving a car on public roads. That is an activity that a person must obtain a government license to engage in, and demonstrating a knowledge of basic motor vehicle law is a condition of obtaining the license. Instead of actually taking a chemical sample based on the implied consent, though, North Dakota gives the driver the power to choose—either give actual, informed consent or face penalties for refusal.

In North Dakota, the motorist must be informed of those penalties for refusal after valid arrest. The motorist is also informed of the consequences of actual consent—if the test results indicate the levels of intoxicants are above the legal limit, it can be used as evidence against him or her in a subsequent criminal prosecution for DUI. Alternatively, consenting to a chemical test can exonerate a non-intoxicated motorist. "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth*, 412 U. S., at 243.

Informed with the two options and the consequences that follow, the motorist must make a choice. If the motorist chooses to consent, then actual consent is given and it constitutes a valid exception to the warrant requirement. If the motorist chooses not to consent, automatic sanctions for refusal kick in and the police officer cannot rely on actual consent to test. Testing must be achieved per a warrant or other warrant requirement exception. *McNeely*, 133 S. Ct., at 1563, 185 L. Ed. 2d, at 709; see also *People* v. *Harns*, 234

Cal. App. 4th 671, 686, 184 Cal. Rptr. 3d 198, 210 (2015).

Even though every motorist in North Dakota implies consent when driving on the public roadways, under the current statutory guidelines, and consistent with *McNeely*, any consent given must be informed and actual before a test is performed, and Beylund gave such a consent in this case.

C. Voluntariness.

Petitioner argues that the criminal penalty for refusal in and of itself renders consent in every circumstance coerced and thus involuntary. Because the threat of criminal punishment coerced him into agreeing to a chemical blood test, his consent was not "freely and voluntarily" given and therefore invalid.

This Court generally avoids bright line rules when evaluating facts and circumstances implicating the Fourth Amendment. See *Robinette*, 519 U. S., at 39. Determining whether police conduct is coercive requires an inquiry into " 'whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.' " *Drayton*, 536 U. S., at 202 (quoting *Florida* v. *Bostick*, 501 U. S. 429, 436 (1991)). The reasonable person test "is objective and 'presupposes an *innocent* person.' " *Ibid.* (emphasis in original).

In a DUI situation, the motorist is already under arrest when he or she is advised of the implied consent law. Even though a motorist is arrested and not free to leave, he or she has the statutory ability to decline the officer's request to test and terminate that encounter. Petitioner's argument, however, is slightly distinguishable because he is not arguing that the police officer's conduct is coercive, but rather that the statutory

criminal penalty for refusal is *per se* coercive. In other words, he is arguing that the state legislature's penalty is coercive.

"[T]he criminal process often requires suspects and defendants to make difficult choices." *Neville*, 459 U. S., at 564. "[T]he choice to submit or refuse to take a blood alcohol test will not be an easy or pleasant one for a suspect to make." *Ibid.* The role of the legislative branch of government is to create laws. All 50 states have a strong interest in eradicating drunk driving on its roadways. All 50 state legislatures have enacted implied consent laws in an effort to further their interest in removing inebriated drivers from the roads. These laws help ensure that law-abiding citizens are not put in harm's way of someone who chooses to drink alcohol or consume drugs and then operate a motor vehicle. Implied consent to alcohol or drug testing is one legal tool states have "to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct., at 1566, 185 L. Ed. 2d, at 712 (plurality opinion).

The legislatures of 15 of those 50 states added another weapon to its drunk driving arsenal by criminally penalizing those who refuse testing after being lawfully arrested for driving while intoxicated. This is not a situation where citizens are randomly pulled over and forced to submit to arbitrary chemical testing. Rather, this is a situation where law enforcement has established probable cause to arrest a motorist *prior* to testing. The police officer has determined in his or her expert, trained capacity that the motorist is impaired

and constitutes a grave danger to others on the public roadways.[7]

The North Dakota legislature decided that the state's interest in keeping the impaired driver off of the road is imperative and that BAC testing is the best physical evidence to be used against that driver in a future criminal proceeding to prevent that driver from going unpunished and driving impaired again.[8] To promote this valid law enforcement technique to hold drunk drivers accountable, elected state officials decided to make punishment for the withdrawal of consent tougher. They decided to make it a crime.

> "Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous." *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957) (footnotes omitted).

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7. "The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts." *Mackey*, 443 U. S., at 14.

8. See *State* v. *Won*, 136 Haw. 282, 325-326, 361 P. 3d 1195, 1228-1229 (2015) (Nakayama, J., dissenting) (discussing extreme DUI rates and recidivism).

Whether a criminal penalty for refusing to take a chemical test unconstitutionally coerces a motorist to submit to chemical testing in violation of the individual's Fourth Amendment rights is a question of first impression in this Court. *South Dakota* v. *Neville*, *supra*, a Fifth Amendment case, is, however, instructive on this issue.

In *Neville*, the issue was whether a motorist's refusal to submit to a chemical test pursuant to South Dakota's implied consent law could be introduced as evidence against the motorist in a subsequent criminal proceeding without violating his or her Fifth Amendment right against compelled self-incrimination. 459 U. S., at 554. South Dakota's implied consent law similarly permitted a motorist to refuse chemical testing to "avoid violent confrontations." *Id.*, at 559-560.[9]

To discourage refusals, South Dakota allowed the refusal to be used against the motorist at trial. *Id.*, at 560. This Court stated that "no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal[.]" *Id.*, at 562. This Court discussed the *choice* faced by the motorist—either submit to testing or refuse. *Ibid.* This Court acknowledged that giving the suspect a choice does not resolve the "compulsion inquiry" in all cases. *Id.*, at 562-563. In a Fifth Amendment scenario where the defendant is told to testify at trial, his or her choices are to testify, falsely testify (risking perjury) or refuse to

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9. Unlike the present case, the direct penalty in South Dakota for refusal was purely civil. *Neville*, 459 U. S., at 560. If a motorist refused, after an administrative hearing, his or her driving privileges could be revoked for one year. *Ibid.* "Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections." *Ibid.*

testify (risking contempt). *Id.*, at 563. Forcing a choice of that nature is generally prohibited by the Fifth Amendment. *Ibid.* However, in the DUI context, the choice between submitting to a chemical test or having the refusal used as evidence is permissible. *Ibid.*

Relying on *Schmerber*, this Court stated that because a state can compel a motorist to take a chemical test against his will, the choice of whether to submit to a chemical test is "legitimate" and continues to be legitimate when given "a second option of refusing the test, *with the attendant penalties for making that choice.*" *Ibid.* (emphasis added). This Court further stated, "that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Id.*, at 564.

Neville held that a motorist's refusal to take a chemical test after being lawfully arrested is not a government coerced act, and thus not protected by the Fifth Amendment. *Ibid.* Thus, the motorist's refusal to consent can be used as probative evidence of guilt. *Ibid.* *Neville*'s analysis is highly instructive to this case. Even though *McNeely* narrowed *Schmerber's* holding with regard to forced, warrantless blood draws, the choice faced by a motorist in this Fourth Amendment case is as follows: (1) consent—submit to a chemical test; (2) refuse—the police officer obtains a warrant and forces a chemical test; or (3) refuse—the police officer does not obtain a warrant[10] and no chemical test is

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10. In this scenario, either the officer chooses not to seek a warrant, or alternatively, does seek a warrant, but either the length of time to secure a warrant exceeds two hours, N. D. Cent. Code § 39-20-04.1(1), or a warrant is not approved by a judicial officer. The lack of testing after the suspect's

given. A motorist is also offered a true choice in this situation. The attached penalties for refusal, whether civil or criminal, for making the choice, is similarly not an impermissible coerced act.

The reasonable *sober* motorist who is pulled over on suspicion of impaired driving can choose to cooperate with chemical testing and be let go if the results negate intoxication. The reasonable *intoxicated* motorist can also choose to cooperate with testing, and face the consequences if the results are unfavorable, or can refuse to cooperate. But, if the motorist chooses to refuse, the legislature has made that choice a bit more difficult, which is constitutionally permissible. *Neville*, 459 U. S., at 564.

The states' use of actual or threatened criminal penalties to deter criminal behavior is constitutionally permitted. Otherwise, a criminal act goes unpunished because a savvy DUI suspect knows that refusing a chemical test deprives the state of probative evidence of a crime. Simply because the North Dakota legislature criminally penalizes a motorist's test refusal does not render the implied consent law *per se* coercive, but rather it is a reasonable method of ensuring public safety.

II. North Dakota's implied consent law does not place an unconstitutional condition on a motorist's Fourth Amendment right to be free from unreasonable searches and seizures without a warrant.

The unconstitutional conditions doctrine ordinarily prevents the government from granting or denying a

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refusal is the focus of the third choice.

particular privilege on the condition of relinquishing a constitutional right. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 545 (1983). However, as with all Fourth Amendment inquiries, this Court must examine the reasonableness of the condition.

Petitioner contends that North Dakota's implied consent law unconstitutionally conditions his state-granted privilege of operating a motor vehicle upon the requirement that he submit to a chemical test of his breath, blood, or urine. In other words, he claims that because he has a Fourth Amendment right to be free from unwarranted searches and seizures, North Dakota cannot condition the grant or denial of that privilege by mandating he consent to a chemical search of his body without a warrant.

A. Compelling Interest.

The government's objective of conditioning driving privileges on the consent to chemical testing if arrested on suspicion of DUI is to prevent impaired drivers from injuring or killing others. "In 2011, 32,367 people died in the United States in traffic crashes. Thirty-one percent (9878) of those fatalities involved an impaired driver[.]" National Highway Traffic Safety Admin., Traffic Safety Facts, Research Note, Breath Test Refusal Rates in the United States—2011 Update 1 (No. DOT HS 811 881, Mar. 2014).[11] The ability to drive a motor vehicle on a public roadway is not a fundamental right, but rather a privilege that is conditioned upon compliance with statutory licensing procedures. *Hendrick* v. *Maryland*, 235 U. S. 610, 622 (1915) (it is "an exercise of the police power uniformly recog-

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11. http://www.nhtsa.gov/staticfiles/nti/pdf/Breath_Test_Refusal_Rates-811881.pdf (as visited March 10, 2016).

nized as belonging to the States and essential to the preservation of health, safety and comfort of its citizens"). A state may restrict the use of its highways to motorists who have complied with the license, insurance, and vehicle registration laws of its state. *Ibid.*

In addition to administrative regulations, every driver has a duty to exercise a certain level of care when operating a motor vehicle. Motorists, for example, must obey the posted speed limit, must use their headlights when driving at night, and must wear a seatbelt. If they do not, there are consequences. An errant motorist is usually civilly penalized with a monetary fine. However, if a motorist operates a motor vehicle in a reckless or aggressive manner in disregard of the safety of people and property, criminal penalties will attach. See, *e.g.*, Ariz. Rev. Stat. § 28-693 (reckless driving, Class 2 misdemeanor, four months jail time for first offense); Ariz. Rev. Stat. § 28-695 (aggressive driving, Class 1 misdemeanor, six months jail time); Mass. Gen. Laws, Ch. 90 § 17B (drag racing—up to 2 ½ years jail time, plus license suspension).

Drunk driving, like reckless driving or drag racing, is not safe driving. It is putting other innocent people in direct and grave danger. Drunk drivers should face significant consequences for refusing to cooperate with law enforcement's efforts to protect unsuspecting citizens from death or serious bodily harm. This Court must evaluate the state's interest in preventing impaired driving against the Fourth Amendment interests of lawfully arrested, inebriated motorists. See, *e.g.*, *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976). The public's interest in protecting innocent people and keeping drunkards off the roads is significant in comparison to the privacy interests of an arrested motorist who made the *choice* to drink and drive, and, if caught, is given the *choice* of whether to

consent to chemical testing or refuse with consequences.

All states have a significant interest in eradicating drunk driving. *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990). Motorists may not ignore laws governing the use of public roadways without consequence. A motorist's state granted *privilege* of operating a motor vehicle must respect the *fundamental right* of others to be free from bodily harm. Privileges are earned, not given.

From an early age, citizens are warned about the dangers of drinking and driving. Public service announcements on the television, radio, and billboards warn that "buzzed driving is drunk driving" and "friends don't let friends drive drunk."[12] When young drivers prepare to take the driver's license examination at the early age of 16, they are warned of the consequences of impaired driving. See, *e.g.*, Dept. of Motor Vehicles, CA Driver Handbook 78-85 (English 2016) (alcohol and drugs).[13] We have all been caught in bumper to bumper traffic due to alcohol or drug related vehicle accidents. We are all familiar with news headlines that show horrific details of innocent families tragically killed by an impaired driver. We may have friends or family who were killed by an impaired driver who chose to drive drunk and who forever changed the lives of others.

If a motorist chooses to drink or ingest drugs and then operate a motor vehicle, it is not because he or she is unaware of its prohibition. Rather, he or she makes

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12. http://www.adcouncil.org/Our-Campaigns/The-Classics/Drunk-Driving-Prevention (as visited March 8, 2016).

13. https://www.dmv.ca.gov/pubs/dl600.pdf (as visited March 10, 2016)

the choice (albeit impaired choice) to ignore the laws and drive anyway.

DUI recidivism rates are very unnerving to the states' law enforcement officers. According to the National Highway Traffic Safety Administration ("NHTSA"), drivers involved in fatal accidents with a BAC of .08 or higher were six times more likely to have a prior DUI conviction or a suspended or revoked driver's license than a non-impaired driver.[14] Repeat offenders are more likely to refuse a chemical test because they know that the use of BAC evidence in a criminal DUI proceeding will provide stronger evidence of criminality than refusal, and in most states will result in more severe penalties.[15] If states were able to place test refusal sanctions on the same playing ground as *per se* BAC test result sanctions, repeat offenders would be less likely to continue driving impaired (for at least a short time period). If the repeat offender eventually hits and kills another, the motorist will be criminally punished and jailed for an extended time period. But states should not have to wait for tragedy to strike to keep impaired motorists from using the public roadways.

The rationale underlying the implied consent law is of paramount importance to public safety and is a valid regulation of the use of public roadways. The government's compelling interest in obtaining BAC evidence

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14. National Highway Traffic Safety Admin., Traffic Safety Facts —2013 Data, Alcohol Impaired Driving 4 (No. DOT HS 812 102, Dec. 2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf (as visited March 8, 2016).

15. National Highway Traffic Safety Admin., Breath Test Refusals in DWI Enforcement: An Interim Report (Aug. 2005), http://www. nhtsa.gov/staticfiles/nti/pdf/809876.pdf (as visited March 8, 2016).

of arrested, impaired motorists by criminalizing the choice to refuse is a reasonable means of enforcing its DUI laws and does not unconstitutionally condition a motorist's driving privileges.

B. Property Inspections Cases Distinguished.

In *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 526 (1967), a San Francisco city ordinance authorized city housing inspectors to enter any building in the city without reason in order to inspect for code violations. The defendant lessee of a ground floor apartment refused to allow a municipal health inspector to search his personal residence without a warrant. *Ibid.* The defendant was criminally charged with refusing to permit an inspection of his residence. *Id.*, at 527 The defendant argued that the law violated the Fourth and Fourteenth Amendments in that it criminally prosecuted him for refusing to permit a city official to enter his private residence without a warrant and *without probable cause* of a housing code violation. *Ibid.* This Court held that it was unconstitutional to convict the defendant for refusing to consent to the inspection and that he had a constitutional right to demand that the inspectors obtain a warrant prior to any search. *Id.*, at 540.

In *See* v. *Seattle*, 387 U. S. 541 (1967), a Seattle city ordinance permitted the city fire chief to enter all nonresidential buildings and premises without reason to inspect for fire hazards without a warrant. The defendant refused to permit entry into his locked commercial warehouse and was criminally charged for refusal. *Id.*, at 542. Relying on its analysis in *Camara*, this Court held that "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse." *Id.*, at 546.

In *City of Los Angeles* v. *Patel*, 576 U. S. __, 135 S. Ct. 2443, 2447-2448, 192 L. Ed. 2d 435, 442 (2015), Los Angeles municipal code mandated every hotel operator to keep a record of specified guest information and allow its inspection by any Los Angeles police officer on demand. Failure to make the guest records available to law enforcement for inspection on demand would result in criminal charges. *Ibid.* Several Los Angeles hotel operators challenged the code as being facially unconstitutional under the Fourth Amendment. *Id.*, 135 S. Ct., at 2447, 192 L. Ed. 2d, at 442. This Court held "that a hotel owner must be afforded an *opportunity* to have a neutral decision maker review an officer's demand to search the registry before he or she faces penalties for failure to comply." *Id.*, 135 S. Ct., at 2453, 192 L. Ed. 2d, at 447 (emphasis in original).

The challenged laws of those three cases all authorized arbitrary, warrantless, and suspicionless searches of property without giving the property owners the statutory ability to refuse the search. The purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara*, *supra*, 387 U. S., at 528. These three administrative search cases all involved criminal penalties for refusing a *suspicionless* search without a warrant. North Dakota's implied consent law, on the other hand, does not authorize an arbitrary, suspicionless search. The motorist must be under arrest after a police officer has determined probable cause exists to believe he or she is driving under the influence of intoxicants, which is a crime. In addition, none of the activities involved in these cases presented as grave a risk to human life as drunk driving. In all three cases, then, the Fourth Amendment rights impaired were far greater and the public interest was far less. The implied consent law applies only to persons who choose to engage in a heavily

regulated activity involving danger to other people. This case is more like *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S., at 619-621, than it is like *Camara*.

The privacy interests of a lawfully arrested motorist who is given a choice to obey the law or refuse is minor in comparison to every citizen's fundamental right to be free from bodily harm. North Dakota's imposition of criminal sanctions on an arrested motorist for refusing a chemical test does not unconstitutionally condition a motorist's Fourth Amendment rights.

III. The federal exclusionary rule does not bar introduction of evidence obtained in violation of a motorist's Fourth Amendment rights at a state administrative driver's license suspension hearing.

If this Court were to conclude that BAC evidence obtained from a motorist under North Dakota's implied consent law was the product of an unconstitutional search, nothing in federal law would preclude introduction of that evidence in a subsequent driver's license suspension hearing.

"[T]he government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the constitution." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 362 (1998). In an effort to deter illegal searches and seizures, the judicially created "exclusionary rule" prohibits the introduction of illegally seized evidence in situations "where its deterrence benefits outweighs its 'substantial social costs.' " *Id.*, at 363 (quoting *United States* v. *Leon*, 468 U. S. 897, 907 (1984)).

North Dakota does not apply the federal exclusionary rule to license revocation proceedings. In *Holte* v.

North Dakota State Highway Comm'r, 436 N. W. 2d 250, 252 (N. D. 1989), the North Dakota Supreme Court decided not to extend the exclusionary rule to civil proceedings,

> "in view of the legislative purpose to gather reliable evidence of intoxication or non intoxication, the legislative direction to receive in evidence the results of fairly administered chemical tests, our previous holdings that an affirmative refusal is necessary to withdraw the implied consent to take the test, and the role of administrative suspension proceedings in protecting the public[.]" *Ibid.*

Further, driver's license suspension hearings are "separate and distinct" from criminal DUI proceedings. *State* v. *Zimmerman*, 539 N. W. 2d 49, 52 (N. D. 1995) (criminal prosecution and administrative driver's license suspension does not constitute double jeopardy). Civil proceedings were designed to temporarily remove impaired drivers from the highways to protect the traveling public, whereas criminal proceedings seek to punish and deter impaired drivers. *Id.*, at 51.

Section 39-20-07 of North Dakota Century Code governs the evidentiary use of chemical analysis test results. A chemical test report must be admitted into evidence if these four foundational elements are documented or demonstrated:

> "(1) the sample must be properly obtained, (2) the test must be fairly administered, (3) the method and devices used to test the sample must be approved by the director of the state crime laboratory or the director's designee, and (4) the blood test must be performed by an authorized person or by one certified by the director of the state crime laboratory or the director's designee as qualified to perform it."

Filkowski v. *Dir., N. D. Dep't of Transp.*, 862 N. W. 2d 785, 790 (N. D. 2015).

Petitioner seeks to give an expansive interpretation to the requirement that the sample be "properly obtained" so as to include a state Fourth Amendment exclsionary rule. He cites to *State* v. *Jordheim*, 508 N. W. 2d 878, 882 (N. D. 1993), and *State* v. *Friedt*, 735 N. W. 2d 848, 854 (N. D. 2007), for the proposition that the chemical test "must have been the result of a valid arrest or other precondition for its administration' " for it to be "properly obtained." Brief for Petitioner 14. Because his blood test was the product of coerced consent, he claims, the unconstitutional nature of the search requires remand and the blood test results must be excluded. *Ibid.* That is not what "properly obtained" means in the authorities Petitioner cites.

In North Dakota, Form 104 is used to satisfy the foundational elements required by N. D. Cent. Code § 39-20-07(5). Form 104 was drafted by the State Toxicologist and is used when blood is drawn for blood-alcohol analysis. *State* v. *Steier*, 515 N. W. 2d 195, 196 (N. D. 1994); *Jordheim*, 508 N. W. 2d, at 881. In *Jordheim*, the North Dakota Supreme Court stated,

> "[g]iven the detailed directions in Form 104 (6-92), it is difficult to imagine a case when certified compliance with them will not also furnish facial evidence that the sample was properly obtained and the test fairly administered, *if the test was the result of a valid arrest or other precondition for its administration*. See *Wilhelmi* v. *Director of Dep't of Transp.*, 498 N. W. 2d 150 (N. D. 1993); *State* v. *Hansen*, 444 N. W. 2d 330 (N.D. 1989)." *Id.*, at 882 (emphasis added).

The issue in *Hansen*, a criminal DUI case, was whether an arrest of a conscious motorist is required

before a chemical blood test can be compelled. *State* v. *Hansen*, 444 N. W. 2d 330, 331 (N. D. 1989). The North Dakota Supreme Court examined the legislative history of the implied consent statute and held that an arrest is first required. *Id.*, at 333. Because the motorist was not arrested prior to a compelled blood draw, the motorist's blood test results were properly suppressed. *Ibid.*

The issue in *Wilhelmi*, a civil license suspension case, was whether an arrest of an *unconscious* motorist is required before a compelled blood test. *Wilhelmi* v. *Director of Dep't of Transp.*, 498 N. W. 2d 150, 153 (N. D. 1993). The court held that under the state statute an arrest is not a precondition and that probable cause to believe that the unconscious motorist was under the influence of alcohol suffices. *Id.*, at 154. Because the motorist was unconscious when her blood was withdrawn, and there was sufficient evidence of probable cause to justify a chemical blood test, the blood test results were properly admitted. *Id.*, at 156.

Wilhelmi and *Hansen* focus on arrest and probable cause as *statutory* preconditions to chemical testing under the state's implied consent laws. If a conscious motorist was arrested prior to chemical testing, then the statutory precondition to test administration was satisfied, and the sample was "properly obtained." If there was evidence of probable cause to believe an unconscious motorist was under the influence when the accident occurred, then the officer can take a blood test without arrest, and the sample was "properly obtained."

In addition to statutory preconditions, a "properly obtained" blood test refers to its *method of collection* by an authorized technician, not the circumstances that led to its collection, or why it was collected. A signed statement from the qualified individual who drew the

motorist's blood constitutes a testimonial statement whose sole purpose is to establish prima facie evidence that the blood was properly drawn and thus properly obtained. *State ex rel. Roseland* v. *Herauf*, 819 N. W. 2d 546, 552-553 (N. D. 2012). The petitioner does not argue that the method in which his blood was collected was improper. Thus his blood was "properly obtained" as that term is used in the statute.

There is no need to speculate on whether North Dakota would extend the exclusionary rule to civil proceedings and no need to remand for that determination. The North Dakota Supreme Court has expressly addressed the question. In *Holte*, the court refused to exclude the results of a test taken in violation of the right to counsel, stating, "we agree with the rationale of the Iowa Supreme Court in refusing to extend the exclusionary rule to civil proceedings as enunciated in *Westendorf* v. *Iowa Dep't*, 400 N. W. 2d 553, 557 (Iowa 1987)." 436 N. W. 2d, at 252.

Although the right to counsel involved in *Holte* was statutory, *id.*, at 251, the court's decision did not rest on that distinction. To the contrary, the court explicitly relied on the principle that "*constitutional* protections afforded in criminal proceedings are not applicable in administrative license-suspension proceedings." *Id.*, at 252 (emphasis added). Even more clearly on point is the court's express adoption of the rationale in *Westendorf*. That case was a Fourth Amendment case, and it expressly relied on this Court's precedents declining to extend the exclusionary rule to a variety of noncriminal proceedings. See *Westendorf* v. *Iowa Dep't of Transp.*, 400 N. W. 2d 553, 556-557 (Iowa 1987). "We apply the cost-benefit framework delineated in *Lopez-Mendoza*,[16] balancing the potential benefit of excluding unlawfully

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16. *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984).

seized evidence against the resulting cost to societal interests." *Ibid.*

Petitioner claims that "as a matter of North Dakota law, the Department of Transportation may not rely on blood tests performed on a sample taken in violation of an individual's constitutional rights," Brief for Petitioner 14, yet he does not cite any authority that remotely supports that proposition. *Jordheim*, as noted earlier, is about statutory prerequisites. *State* v. *Friedt*, 735 N. W. 2d, at 849-850, is a confrontation objection to the introduction at trial of a form containing statements of the nurse who drew the blood. It has nothing to do with whether the sample was validly obtained.

There is good reason why Petitioner does not cite any North Dakota case on point. The case on point is *Holte*, and it is squarely contrary to his position. *Holte* adopts *Westendorf*, and *Westendorf* adopts *Lopez-Mendoza*. If federal law does not require exclusion of this evidence, then North Dakota law does not either.

IV. Subsequent invalidation of a statutory penalty does not render consent involuntary or coerced.

If this Court concludes that North Dakota's criminal refusal statute is unconstitutional, it does not render the petitioner's consent to chemical testing involuntary.[17] In *Brady* v. *United States*, 397 U. S. 742 (1970), the defendant was charged with kidnapping and faced the maximum penalty of death if convicted. *Id.*, at 743. Upon learning that his co-defendant confessed to the

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17. On this point, *amicus* CJLF respectfully disagrees with the State's position that a remand would be in order. This Court can categorically decide that neither reversal nor remand is required in this situation.

crime and would be available to testify against him, the defendant pled guilty and was sentenced to imprisonment. *Id.*, at 743-744.

After the defendant's plea was entered, this Court ruled that the death penalty provision of 18 U. S. C. § 1201(a) was unconstitutional in that it imposed "an impermissible burden upon the exercise of a constitutional right." *Brady*, 397 U. S., at 746 (quoting *United States* v. *Jackson*, 350 U. S. 570, 572 (1968)). Several years later, the defendant sought to set aside his guilty plea, arguing that it was not voluntarily made and that the possibility of receiving the death penalty was coercive. *Id.*, at 744. This Court held that a defendant may not withdraw or set aside a guilty plea simply because he or she misjudged the consequences of entering the plea or "misapprehended the quality of the State's case or the likely penalties attached to alternate courses of action." *Id.*, at 757.

A guilty plea waives a criminal defendant's constitutional right to a trial before a jury or judge. *Id.*, at 748. The defendant's consent that a conviction may be entered against him or her without a trial must be knowing and voluntary. *Ibid.* Voluntariness is determined by evaluating all of the relevant circumstances surrounding the plea. *Id.*, at 749. The government may not entice a plea by threatening physical harm or mentally coercing a defendant. *Id.*, at 750. However,

> "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his

> counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction." *Ibid.*

Here, the petitioner waived his Fourth Amendment rights when he consented to a chemical test after his lawful arrest. Similar to a guilty plea in a criminal case, the petitioner's consent must be knowing and voluntary In *Brady*, this Court held that just because a guilty plea may have been encouraged by the fear of a penalty later struck down does not mean it was involuntary or invalid. *Id.*, at 747. Even if this Court were to find the criminal refusal penalty in the statute is unconstitutional, that would not render the petitioner's consent to chemical testing involuntary or coerced.

There is no need for a remand for an "all the facts and circumstances" determination because *Brady* disposes of the only circumstance petitioner claims. The North Dakota Supreme Court noted that "Beylund alleges no other coercive circumstances, other than the penalties" in the statute. *Beylund* v. *Levi*, 859 N. W. 2d, at 409. *Brady* establishes that a decision to waive rights in order to avoid penalties prescribed in a statute does not become retroactively involuntary when the statute is struck down. No federally protected right of the petitioner was violated in the proceeding suspending his driver's license, regardless of how this Court decides the companion criminal cases. There is nothing else to decide in this case.

CONCLUSION

The judgment of the North Dakota Supreme Court should be affirmed.

March, 2016

Respectfully submitted,

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